RECORD, CASE No. 14,164.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 190.

D. B. MILLER AND L. B. MILLER, PLAINTIFFS IN ERROR,

vs.

JOHN CALDWELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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1 In the Supreme Court of the United States, of October Term, in the Year of Our Lord One Thousand Eight Hundred and Ninety.

DANIEL B. MILLER and L. B. MILLER
vs.
JOHN CALDWELL.
} In Error (from Supreme Court of the State of Kansas).

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Daniel B. Miller and L. B. Miller, by their attorneys, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit:

That the declaration aforesaid and matters therein contained are not sufficient in law for the said John Caldwell to have or maintain his aforesaid action thereof against the said Daniel B. Miller and L. B. Miller.

There is also error in this, to wit:

That by the record aforesaid it appears that the judgement aforesaid given was given for the said John Caldwell against the said Daniel B. Miller and L. B. Miller, whereas by the law of the land the said judgement ought to have been given for the said Daniel B. Miller and L. B. Miller against the said John Caldwell.

There is also error in this to wit:

That on the trial and in the record aforesaid it appears that there was drawn in question the construction of a statute of the United States, through and under which the said Daniel B. Miller and L. B. Miller claimed title to the land in controversy, and the decision was against the right and title claimed under by them.

And the said Daniel B. Miller and L. B. Miller pray that the judgement aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of said judgement, etc.

ALMERIN GILLETT,
Att'y for D. B. Miller and L. B. Miller.

[Endorsed:] Filed Sep. 8, 1890. C. J. Brown, clerk sup. court.

2 In the Supreme Court of the State of Kansas.

JOHN CALDWELL, Plaintiff in Error,
vs.
D. B. MILLER and L. R. MILLER, Defendants in Error.
}

Be it remembered that on the 3rd day of April, 1888, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition in error, with a case made, from the district court of Reno county, attached thereto and made a part thereof, and with a waiver of the issuance and service of a summons in error endorsed thereon; which said petition in error, case made, and waiver of summons in error are in words and figures as follows, to wit:

3 In the Supreme Court of the State of Kansas.

JOHN CALDWELL, Plaintiff in Error,
vs.
D. B. MILLER and L. B. MILLER, Defendants in Error.

Petition in Error.

Comes now the plaintiff in error, John Caldwell, and complains of the defendants in error, D. B. Miller and L. B. Miller, and says that the said defendants in error recovered certain orders and judgments of the district court of Reno county, Kansas, sitting within and for the ninth judicial district in said county and State, in a certain action then pending in said district court, wherein said plaintiff in error was plaintiff and the said defendants in error, D. B. Miller and L. B. Miller, and others were defendants; that a duly certified transcript of the record in said cause is hereto attached, marked Exhibit "100," and made a part of this petition in error; and the plaintiff in error avers that there is error in the record of said cause, as shown by said certified transcript annexed hereto; that such errors are as follows, to wit:

First. That the court erred in retaining jurisdiction of said cause and in holding the same for further proceedings after the presentation and filing of the petition and bond for removal, filed and presented by the defendants therein, D. B. Miller and L. B. Miller, and that thereafter the court had no jurisdiction whatever of said cause, and its orders and judgments thereafter made are erroneous, null, and void.

Second. That the court erred in sustaining the defendants', D. B. Miller and L. B. Miller's, application for a continuance on the 25th day of September, 1886, at the September term, 1886, of said court.

Third. That the court erred in granting D. B. Miller leave to file an amended answer September 25th, 1886.

Fourth. That the court erred in overruling and refusing to sustain the plaintiff's motion to strike the amended answer of D. B. Miller from the files, September 25th, 1886.

Fifth. The court erred in granting leave to the defendant D. B. Miller to file a supplemental answer on the 6th day of January, 1887, at the regular January, 1887, term of said court.

Sixth. That the court erred in overruling plaintiff's demurrer to the supplemental answer, called the answer of D. B. Miller, January 11th, 1887, at the January, 1887, term of said court.

Filed April 3, 1888.

C. J. BROWN,
Clerk Sup. C't.

4 Seventh. The court erred in its findings of fact.

Eighth. The court erred in concluding as conclusions of law, under the statutes of the United States, that the plaintiff and his grantors could not inherit under such statutes.

Ninth. That the court erred in its construction of the laws of the United States.

Tenth. That the court erred in rendering judgment against the plaintiff.

Eleventh. The court erred in rendering judgment in favor of the defendants.

Twelfth. That the court erred in failing to render judgment on the special findings of fact in favor of the plaintiff.

Thirteenth. That the court erred in overruling and in refusing to sustain the plaintiff's motion for a new trial.

That all of the above erroneous orders and judgments of said court were duly excepted to by the plaintiff, as shown by said certified transcript of the record attached hereto.

Wherefore plaintiff in error prays that said orders and judgments of said court and each of them separately be reversed and set aside, and that said cause be remanded with a mandate to the court below to render judgment in favor of the plaintiff upon the special findings of fact; and if this court should be of the opinion that said court had no jurisdiction of said cause, that it be remanded with a mandate to order the same removed to the circuit court of the United States for the district of Kansas for trial; and if this court should be of the opinion that said plaintiff in error is not entitled to a judgment on the findings of fact and should also be of the opinion that said court had jurisdiction of said cause, then the plaintiff in error prays that said cause be reversed and remanded with a mandate to the court below to grant a new trial. Plaintiff in error also asks for general relief.

BROWN & KLINE,
Attorneys for Plaintiff in Error.

5 In the Supreme Court of the State of Kansas.

JOHN CALDWELL, Plaintiff in Error,
vs.
D. B. MILLER and L. B. MILLER, Defendants in Error.

The above-named defendants in error waive the issuance and service of a summons in error in this proceeding and enter their appearance herein.

VANDEVEER & MARTIN,
Att'ys for Defendants in Error and Att'ys for said Def'ts in the Court Below.

Endorsed: Caldwell *v.* Miller & Miller. Waiver of summons.

EX. 100 TO PETITION IN ERROR.

The State of Kansas to the sheriff of Reno county, Greeting:

You are hereby commanded to notify D. B. Miller, L. B. Miller, Mary Gibbons, Emily Tubbs, Amos Miller, —— Miller, —— Miller, —— Miller, —— Miller, —— Miller, —— Miller, the last seven named defendants being the heirs-at-law of Benj. Titus, deceased, that they have been sued in the district court within and for the county of

Reno, in the ninth judicial district of the State of Kansas, and must answer the petition filed by the plaintiff, John Caldwell, on or before the 30th day of July, A. D. 1885, or the said petition will be taken as true and judgment rendered accordingly; and return this writ on the 10th day of July, A. D. 1885.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at my office, at Hutchinson, in said county, this 30th day of June, A. D. 1885.

J. B. VINCENT,
Clerk District Court,
By J. P. DILLON, *Deputy.*

Endorsed on back: John Caldwell *vs.* D. B. Miller *et al.* If the defendants fail to answer, the plaintiff will take judgment for $1,230, with interest at the rate of 7 per cent. per annum from the 1 day of July, A. D. 1885, and costs of suit and recovery of ⅜ N. E. sec. John B. Vincent, clerk, —— ——, D. Issued June 30, 1885; returnable July 10th, 1885. Filed July 9, 1885. J. B. Vincent, clerk, —— ——, D. Received this writ this 30th day of June, A. D. 1885, at — o'clock — m., July 7th, 1885. Served the same day by delivering a copy thereof, with the endorsements thereon, duly certified, to the within named personally. —— ——, sheriff. July 7th, 1885, served the same by leaving a copy thereof, with the endorsements thereon, duly certified, at the usual place of residence of the within-named D. B. Miller and L. B. Miller. J. L. Smith, sheriff. July 8th, 1885, none served but the above-named D. B. Miller and L. B. Miller. J. L. Smith, sheriff. Sheriff's fees: Serving summons, first person, .50; one additional person, .25; nine not found, .45; total, $1.20. J. L. Smith, sheriff.

STATE OF KANSAS, } *ss:*
Reno County, }

I hereby certify the within to be a true copy of the original summons, with the endorsements thereon.

J. L. SMITH, *Sheriff.*

6 *Præcipe for Summons.*

THE STATE OF KANSAS, } *ss:*
Reno County, }

In the District Court of said County.

JOHN CALDWELL, Plaintiff,
vs.
D. B. MILLER, L. B. MILLER, *et al.*, Defendants. } Præcipe for Summons.

The clerk of said court will issue a summons in the above-entitled action against defendants D. B. Miller, L. B. Miller, and the other defendants, and endorse the same that the plaintiff will take judgment for the recovery of ⅜ of the N. E. ¼, sec. 12, 23, 6 W.,

and for partition of the same, and that they have damages of said D. B. and L. B. Miller in the amount of $1,230.00 as rent and profits. Direct to the sheriff of Reno county, Kansas, and returnable according to law.

WHITESIDES & HUTCHINSON,
Att'ys for Plaintiff.

Endorsed on back: Filed June 30th, 1885. John B. Vincent, clerk.

7 In the District Court of the 9th Judicial District, Sitting in and for Reno County, Kansas.

JOHN CALDWELL, Plaintiff,
vs.
D. B. MILLER, L. B. MILLER, MARY GIBBONS, EMILY TUBBS, AMOS Miller, —— Miller, —— Miller, —— Miller, —— Miller, —— Miller, —— Miller, Defendants (the Last Named Seven Defendants Being the Heirs-at-law of Benjamin Titus, Deceased).

Petition.

Now comes the said plaintiff, John Caldwell, and complaining of the said defendants, the said D. B Miller, L. B. Miller, Mary Gibbons, Emily Tubbs, Amos Miller, —— Miller, —— Miller, —— Miller, —— Miller, —— Miller, and —— Miller (the last-named seven defendants being the heirs-at-law of Benjamin Titus, deceased), and says that on the first day of September, 1871, Robert Titus was a resident of the county of Reno and State of Kansas. Prior to the said first day of September, 1871, the said Robert Titus made a pre-emption filing on the northeast quarter of section twelve, in township twenty-three, range six west, in said county, and at that date he was holding said claim according to law and had the sole and only right to the same, and he continued to so lawfully hold and to occupy said land as his pre-emption claim until the — day of ——, 1871, and until his death; that on the — day of ——, 1871, the said Robert Titus died in the aforesaid county and State intestate, and at the time of his death he was still lawfully holding and occupying the said tract of land as his said pre-emption claim; that at the time of his death there were no improvements of any kind on said land, except a small house, which the said Robert Titus occupied as his residence, and he owned no other property and he owed no debts.

Plaintiff says further that on the — day of ——, 187–, the defend-
8 ant D. B. Miller had himself appointed by the probate court of Reno county, Kansas, administrator of the estate of the said Robert Titus, deceased. A copy of said appointment is hereto attached, marked Exhibit A, and made a part hereof. That afterwards, on the — day of ——, 187–, the said D. B. Miller, as such administrator, proved upon said claim the tract of land heretofore mentioned in the U. S. land office at Wichita, Kansas, said proof being made by him at that time for the benefit of the heirs of said Robert Titus, deceased, and on the 20th day of April, 1874, the

United States issued to the heirs of said Robert Titus a patent to said land, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging. A copy of said patent is att-ched hereto and made a part hereof and marked Exhibit B.

Plaintiff says further that the said Robert Titus and the wife of Robert Titus were the father and mother of the defendant L. B. Miller and were the father-in-law and mother-in-law of the defendant D. B. Miller, and about the year 1852 the said Robert Titus and his wife entered into an contract with the said D. B. Miller and his wife, L. B. Miller, which contract was verbal, whereby it was agreed between the said parties that the said Robert Titus and his wife were at that time to go to live with the said D. B. Miller and L. B. Miller for the remainder of their lives, and the said D. B. Miller and L. B. Mil-er were to take all proper and necessary care of the said Robert Titus and his wife while they, the said Titus and wife, should live, and were to furnish them all necessary food, shelter, and clothing and all needed medicine, and also a comfortable home while they should live.

Plaintiff says that, as a consideration for said contract, the said Titus and his wife deeded to the said D. B. Miller and L. B. Miller their farm, which consisted of eighty acres of land in the State of Michigan, which at that time was worth $2,000.00 cash, and also gave to the said Miller and his wife all their personal property, which was worth at that time several hundred dollars. Plaintiff says also that within one year after the making of said contract the said wife of Robert Titus died; that her death was sudden, and that she was well up to the time of her death, and that the said Miller and his wife did not expend any money for doctors or for medicine for her use, and that up to the time of her death she was
9 well and able to do and did do a great deal of work for the said Miller and wife, and that after the making — said contract and while she lived with the Millers she much more than earned her living and paid all of her expenses. Plaintiff also says that the said Robert Titus was a strong, well man up to the time of his death and was able to and also did do a great deal of work and was no expense to the said Miller and wife and, in fact, all the time much more than earned what he got from the Millers; that he was hardly ever sick a day in his life, and that at the time of his death he died sud-enly, and the Millers were to no expense for doctors or for medicine for the said Robert Titus. Plaintiff says that taking the property that the Millers got from Titus and his wife as aforesaid, and also the work that Titus and his wife did for them, that they, in truth and in fact, made a large amount of money out of the said Titus and his wife; at the time of the death of the said Titus and his wife they did not owe D. B. Mil-er or his wife, L. B. Miller, a single cent, and that they owed no other person in the world. Plaintiff further says that the tract of land heretofore mentioned, to wit, the N. E. ¼ of sec. 12, T. 23, R. 6 W., was a valuable tract at the time of the death of the said Robert Titus, and that it lay within one

mile of the city of Hutchinson, and that at the death of the said
10 Robert Titus the said D. B. Miller and L. B. Miller, his wife, conceived the idea of defrauding the heirs of the said Robert Titus out of the land and of getting the same themselves without paying anything for the same; that all this time there were several heirs of the said Robert Titus who were living in the State of Michigan and who were well known to the said Miller and his wife, as *were* also their place of residence, but that the said D. B. Miller and wife never informed any of the said heirs that the said Robert Titus had left them any property in this State, but, on the contrary, informed them that the said Titus had not left anything of any value, and that his claim was not worth paying for what it would take to get it from the Government. Plaintiff says that the said heirs, relying on this statement of the said D. B. Miller and his wife, L. B. Miller, did not come to Kansas to make an examination of the said land and were all the time deceived by the said D. B. Miller and L. B. Miller as to the value of the same; that, still contriving to fraudulently obtain said land, the said Miller, although he obtained a patent to the land in the year 1874, in order to conceal from the public the real ownership of the land and to secure it for himself, did not put the patent on record till the year 1877 and until after there had been a pretended and fraudulent sale to himself of the said land.

Plaintiff further says that, still contriving and intending to defraud the heirs of the said Robert Titus out of their property and after he had, as administrator of the estate of Robert Titus, proven up on said tract of land, the said D. B. Miller, as administrator, on the 5th day of January, 1877, filed with the probate judge of Reno county, Kansas, a pretended, but fraudulent, report of his acts as such administrator, and also on the same date and in the same document filed in the same said court a pretended account against the estate of said Robert Titus, deceased, and also in the same document he tendered his resignation to said court as such administrator, and to all of the statements in the said document he at the time made oath as to the truth of the same. A copy of said document is attached hereto, marked Exhibit C, and made a part hereof. Plaintiff says that said pretended account is false and fraudulent in every particular and was manufactured by the said D. B. Miller and his wife, L. B. Miller, without any foundation in fact or truth; that Miller did not pay any money out as funeral expenses at the time of the death of Robert Titus.

11 At that time they all lived in Reno county, and that they, with one or two other families, were the only residents of the county, and that as a consequence there was no funeral and no expenses, and that they, the Millers, buried Robert Titus in a pine box which they made themselves and which was not worth a dollar; that they or D. B. Miller made no improvements on the said lands and furnished no money to pay for the same prior to the death of Robert Titus and never made any improvements or furnished any money at the request or with the knowledge of any of the heirs of the said Robert Titus or by the order or permission of the probate court of

Reno county. Plaintiff says that D. B. Miller fraudulently manufactured said account solely for the purpose of having a claim against the estate of Robert Titus large enough so that he could bid more than any one else would bid at a sale of the land and yet not have to pay out any money for the land; that he well knew that at the time he put in his said account to the probate court the same was false and fraudulent in every particular; that the estate of Robert Titus, deceased, did not owe him a dollar, and that the said land was then legally and justly the property of the heirs of Robert Titus, and that he had no claim against the same. Plaintiff further says that immediately after the resignation of the said D. B. Miller as administrator one L. S. Shields was, at the instigation of the said D. B. Miller, appointed as administrator of the said estate of Robert Titus, deceased, and that the said Shields, as such administrator, and the probate court accepted and allowed the aforesaid fraudulent account which Miller had filed in the probate court; that afterwards, on the 23rd day of January, 1877, the said administrator, L. S. Shields, at the instigation and request of the said D. B. Miller and L. B. Miller, who were still contriving to defraud the heirs of Robert Titus out of their land, filed in the probate court of Reno county a petition asking an order of the said court that the aforesaid land be sold and alleging therein that the estate of Robert Titus was indebted to the said D. B. Miller in the sum of $8,391.70, and that there was no personal property belonging to said estate with which to pay said indebtedness, all of which was utterly false, as said D. B. Miller and L. B. Miller at the time well knew; a copy of said petition is attached hereto, marked Exhibit D, and made a part hereof; and that afterwards the probate court made an order that said lands be sold in accordance with the prayer of the said Exhibit D,

12 and that afterwards, on the 7th day of April, 1877, the said L. S. Shields, pretending to act as such administrator, made a pretended deed of conveyance of the whole of the said tract of land to the said D. B. Miller. A copy of the said deed is attached hereto and marked Exhibit E and made a part hereof. Plaintiff says that the said D. B. Miller did not pay any money or other thing or any value for said land and that none of the heirs of the said Robert Titus except the said L. B. Miller have ever received a cent of the proceeds of the sale of said land, but that the said L. B. Miller is the wife of the said D. B. Miller and has all the time been connected with him in the scheme to defraud the said heirs out of the land. Plaintiff says that the said D. B. Miller and L. B. Miller have not now and never had any other title to the said tract of land than the one evidenced by the conveyance set forth in Exhibit E and that the same is void and of no legal force or effect whatever. Plaintiff further says that the legal heirs of the said Robert Titus are L. B. Miller, Delight Caldwell, Rachel Crandall, Volney Hicks, Melissa West, Arabel Snyder, Ada Wade, and the defendants Mary Gibbons, Emily Tubbs, Amos Miller, —— Miller, —— Miller, —— Miller, —— Miller, —— Miller, —— Miller, and that there are no other heirs; also that the said L. B. Miller is one of the five children of the said Robert Titus and is now one of his legal heirs and is en-

titled to one-fifth interest in the said land; also that the said Delight Caldwell is another of the five children of Robert Titus and as his heir is entitled to a one-fifth interest in said land; also that the said Rachel Crandall is another of the five children of Robert Titus and as his said heir is entitled to a one-fifth interest in said land; that one Betsey Hicks was another of the five children of the said Robert Titus and as such heir would be entitled to a one-fifth interest in the said land, but that the said Betsey Hicks is dead and that her only legal heirs are Volney Hicks, Melissa West, Arabel Snyder, and Ada Wade, — are entitled to a one-fifth interest in said land. Plaintiff says that the other child and direct heir of Robert Titus was Benjamin Titus, and as such heir the said Benjamin Titus would be entitled to a one-fifth interest in said land, but that the said Benjamin Titus is dead and that his legal heirs are the said Mary Gibbons, Emily Tubbs, Amos Miller, —— Miller, —— Miller, —— Miller, —— Miller, —— Miller, —— Miller, and that the last nine persons mentioned as the legal heirs of the said Benjamin Titus are entitled to a one-fifth interest in said land. Plaintiff further says that on the 21st day of January, 1882, he purchased of the said Delight
13 Caldwell all of her interest in said land and estate for full value, and that on that date the said Delight Caldwell executed and delivered to plaintiff her assignment and deed to all of her interest in the said tract of land and estate, and that this plaintiff is now the owner of the interest of the said Delight Caldwell. A copy of said deed and assignment is attached hereto and marked Exhibit F and made a part hereof. Plaintiff further says that on the 9th day of June, 1885, he purchased of the said Rachel Crandall all of her interest in said land and estate for full value, and that on that date the said Rachel Crandall executed and delivered to this plaintiff her deed and assignment of all of her interest to all of said land and estate; that this plaintiff is now the owner of the same. A copy of said deed and assignment is attached hereto and marked Exhibit G and made a part hereof. Plaintiff further says that on the 14th day of January, 1882, he purchased of the said Melissa West all of her interest in said land for full value, and at that date the said Melissa West executed and delivered to this plaintiff her deed and assignment of all of her interest to all of said land and estate; that this plaintiff is now the owner of all of said interest. A copy of said deed is attached hereto, marked Exhibit H, and made a part hereof. Plaintiff says further that on the 21st day of January, 1882, he purchased of the said Volney Hicks and Ada Wade all of their interests in and to said land and estate for full value, and at that date the said Volney Hicks and Ada Wade executed to this plaintiff their deed and assignment of all of their interest to all of said land and estate; that plaintiff is at this time owner of all of said interest. A copy of said deed is hereto attached and marked Exhibit I and made a part hereof. Plaintiff further says that on the 14th day of February, 1882, he purchased of the said Arabel Snyder all of her interest in said land and estate for full value, and at that date the said Arabel Snyder executed to this plaintiff her deed and assign-

ment of all of her interest in and to said land and estate; that this plaintiff is now the owner of the same. A copy of said deed is attached hereto, marked Exhibit J, and made a part hereof. Plaintiff says that the defendants, L. B. Miller, Mary Gibbons, Emily Tubbs, Amos Miller, —— Miller, —— Miller, —— Miller, —— Miller, —— Miller, —— Miller, —— Miller, all have the same interest as himself in this action—that is, they are entitled to recover of D. B. Miller and L. B. Miller o-e-fifth interest in said lands and estate, and that they should all be joined with him as plaintiffs in this suit, but they
14 each and all have refused to unite with this plaintiff in this action and refused to do anything in the matter and refused to institute any a-tion to recover their interests in said land and estate.

Plaintiff further says that the knowledge of the fraudulent acts of the said D. B. Miller and L. B. Miller, as alleged herein, have come to his assignors and to himself within the last year, and that as soon as he learned the facts he took steps to begin this action. Plaintiff says that the said pretended deed of L. S. Shields, administrator, should be set aside and held to be invalid and should be cancelled, and that this plaintiff should be held to be the legal owner and entitled to an undivided three-fifths interest in said land and to the immediate possession of the same, and defendants Amos Miller, —— Miller, —— Miller, —— Miller, —— Miller, —— Miller, —— Miller are entitled to an undivided one-fifth interest in the same.

2nd cause of action.

For a second and further cause of action against the said D. B. Miller and L. B. Miller this plaintiff says that he is the owner of and entitled to the joint possession with the other heirs of Robert Titus, deceased, of the undivided $\frac{3}{5}$ths interest and part of the north-east quarter of section twelve, in township twenty-three, of range six west, in the county of Reno, in the State of Kansas; that the said D. B. Miller and L. B. Miller wrongfully and fraudulently took possession of said land on the first day of October, 1871, and they have since that time so held the said land, and they have during all this time taken and appropriated to their own exclusive use and benefit all of the rents and profits of the use of said land; that the said D. B. Miller has never had any interest whatever to any part of the land, but that the said L. B. Miller is the owner of an undivided one-fifth interest in the same, and that is the only interest that she has ever had. Plaintiff says that he has often demanded of the said Millers the joint possession with the other heirs of the said land, and also has demanded of them three-fifths of the value of the annual rental of the same, but the said defendants have always refused to give to plaintiff possession of any part of said land or any part of the rent or pay for the use of the same. Plaintiff says the annual rental value of said land has been at least $150 per annum since the first day of October, 1871; that plaintiff is entitled to three-fifths of the value of said rental of said land, in

amount $1,230.00, and that the same is due from the defend-
15 ants D. B. and L. B. Miller and is unpaid. Plaintiff hereby refers to the first count of his petition and makes the same a part of this his second cause of action.

Third cause of action.

For third and further cause of action against the defendants, D. B. and L. B. Miller, plaintiff says that he is entitled to the immediate possession of the land described in the first count of this his petition; that he is the owner of an undivided three-fifths interest in said land, and that L. B. Miller is entitled to one-fifth of said land, and that the said heirs of Benjamin Titus are entitled to the other fifth of said land, and that all are the owners thereof; that all except L. B. Miller are at this time kept out of the possession of the same by the said D. B. Miller, who wrongfully holds the said land; that the said land should be partitioned and three-fifths of the same be set apart to this plaintiff and one-fifth to the said L. B. Miller and one-fifth to the said heirs of the said Benjamin Titus, deceased, to wit, Amos Miller, —— Miller, —— Miller, —— Miller, —— Miller, —— Miller, and —— Miller. Plaintiff hereby refers to the first count of this petition and makes the same a part of this his third count and cause of action.

Wherefore plaintiff prays judgment against the defendants, D. B. Miller and L. B. Miller, that the pretended deed by L. S. Shields to D. B. Miller, as administrator of the estate of Robert Titus, deceased, be cancelled, set aside, and held for naught, and that plaintiff have and recover of the said defendants three-fifth- of the land, and that all of the said defendants be forever barred of all right and interest in and to said three-fifths of said land; also he have judgment against said D. B. Miller and L. B. Miller for the sum of twelve hundred dollars and thirty dollars, with interest on the same, at the rate of seven per cent. per annum, from the first day of July, 1885, and also have judgment against all of the defendants herein; that the said land be partitioned, and that plaintiff have three-fifths of the same set apart for him. Plaintiff also asks judgment — the defendants, D. B. and L. B. Miller, for the costs of this action.

WHITESIDES AND HUTCHINSON,
Attorneys for Plaintiff.

Filed June 30th, 1885.

JOHN B. VINCENT, *Clerk.*

16 EXHIBIT "A."

In the Matter of the Estate of ROBERT TITUS, Deceased.

In the Probate Court of Reno County, Kansas.

To the Honorable L. S. Shields, judge of said court:

The undersigned hereby asks for letters of administration upon the estate of Robert Titus, late of said county, deceased. The esti-

mated value of personal estate of said deceased subject to administration is — dollars. He offers bond in the sum of three hundred dollars, with A. J. Smith and H. P. Miller as sureties, and asks that D. B. Miller be appointed administrator.

Dated July 1st, 1873.

LOUIS MILLER, *Applicant.*

Administrator's Bond.

Know all men by these presents that we, D. B. Miller, as principal, and A. J. Smith and H. P. Miller, as sureties, are held and firmly bound unto the State of Kansas in the sum of three hundred dollars; — the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, and administrators forever, firmly by these presents.

Dated, signed, and sealed by us this first day of July, 1873.

The condition of this obligation is such that whereas the above-bounden D. B. Miller has been duly appointed by the probate court in and for the county of Reno and State of Kansas administrator of the estate of Robert Titus, deceased:

Now, if the said administrator shall make and return into said court on oath within sixty days from this date, or sooner, if ordered by the probate judge, true inventory of all moneys, goods, chattels, rights, and credits of said deceased which are by law to be administered and which have or shall come into his possession or knowledge, and also of the real estate of said deceased, and shall administer according to law all the moneys, goods, chattels, rights, and credits of said deceased, and the proceeds of all his real estate that may be sold for payment of his debts or legacies which may at any time come to the possession of the administrator or to the possession of any other person for him, and shall render upon oath a true account of his administration annually and at any other time when required by said probate court or by law, and shall pay any balance remaining in his hands upon the settlement of his accounts to such
17 persons as the said probate court or the law shall direct, then this obligation shall be void; else to remain in full force and effect.

(Signed) D. B. MILLER.
H. P. MILLER.
A. J. SMITH.

The above bond taken and approved by me this first day of July, 1873.

L. S. SHIELDS,
Probate Judge.

STATE OF KANSAS, } ss:
Reno County, }

In the Probate Court.

I, D. B. Miller, do solemnly swear that I will faithfully perform the duties of administrator of the estate of Robert Titus, late of Reno

county, State of Kansas, deceased, to the best of my ability, so help me God.

D. B. MILLER.

Subscribed and sworn to before me this first day of July, 1873.

L. S. SHIELDS,
Probate Judge.

EXHIBIT "B."

Certificate No. 593.

The United States of America to all to whom these presents shall come, Greeting:

Whereas D. B. Miller, administrator for the heirs of Robert Titus, deceased, of Reno county, Kansas, has deposited in the General Land Office of the United States a certificate of the register of the land office of Wichita, Kansas, whereby it appears that full payment has been made by the said D. B. Miller, administrator, — to the provisions of the act of Congress — on the 24th of April, 1820, entitled "An act making further provisions for the sale of the public lands," for the northeast quarter of section twelve, in township twenty-three south, of range six west, in the district of lands subject to sale at Wichita, Kansas, containing one hundred and sixty acres according to the official plat of the survey of said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said D. B. Miller, administrator: Now know ye that the United States of America, in consideration of the premises and in conformity of the several acts of Congress in such cases
18 made and provided, have given and granted and by these presents do give and grant unto the said heirs of Robert Titus, deceased, and to their heirs the said tract above described; to have and to hold the same, together with all the rights, privileges, and immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said heirs of Robert Titus, deceased, and to their heirs and assigns forever.

In testimony whereof I, Ulyses S. Grant, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the 20th day of April, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States of America the 98th.

By the President.

By A. D. WILLIAMSON, *Secretary.*

Recorded in volume one, page 386.

S. K. LIPPENCOTT,
Recorder of the General Land Office.

Entered on the transfer record June 12th, 1877.

H. W. BEATTY,
County Clerk.

Filed for record June 12th, 1877.

S. A. ATWOOD,
Register of Deeds.

EXHIBIT "C."

STATE OF KANSAS, } ss:
Reno County, }

In the Matter of the Estate of ROBERT TITUS.

Here D. B. Miller, administrator, would show to the honorable probate court of said Reno county that on the first day of January, 1871, he was appointed administrator of the estate of the decedent, Robert Titus; that said decedent left no personal property of any kind whatsoever and no other property except a pre-emption filing on the northeast quarter of section twelve, town twenty-three, range six west; that in pursuance of law the said administrator proceeded to perfect title in the said real estate as administrator of the said estate; that said administrator has received no moneys as such administrator, neither rights, credits, or effects of any kind whatsoever; and the said administrator presents the following account against said estate, to wit:

Estate of Robert Titus to D. B. Miller, Administrator.

To boarding Miriam, wife of said Robert Titus, Jan. 1st, 1852, to December 5th, 1853	$560 00
To clothing for the same	25 00
To funeral expenses for the same	30 00
19 To Dr. bill for the same	170 00
To tombstone for same	25 00
To board of said decedent from June 1st, 185[illegible], to September 8th, 1871	2,900 00
Clothing for said decedent for said period	600 00
Funeral expenses decedent	30 00
Dr. bills for 18 years	200 00
Interest on amounts paid out	2,520 00
Filing on claim	5 00
Entering land	400 00
Expenses of proving up	25 00
Hedges	150 00
Breaking prairie	60 00
Breaking hedge rows	20 00
Fences, buildings, and other improvements	300 00
Taxes on land, '74 & '75	110 00
Interest	261 70
Total	

And the said administrator prays that said account as herein set forth may be allowed him against said estate. The said administrator hereby assigns his trust as said administrator and asks to be

fully released and discharged from all further charge or liability therein.

This fifth day of January, 1876.

D. B. MILLER.

STATE OF KANSAS, } ss:
Reno County. }

The said administrator, D. B. Miller, being first duly sworn according to law, deposes and says that the report made by him as hereinbefore set forth is just and true in every particular.

D. B. MILLER.

Subscribed and sworn to before me this 5th day of January, 1877.

G. V. RICKSECKER,
Probate Judge.

D. B. Miller, administrator of the estate of Robert Titus, requests the probate judge, on accepting his resignation as herein set forth, may appoint L. S. Shields administrator of said estate.

D. B. MILLER.

20 EXHIBIT "D."

To the honorable the probate court in and for the county of Reno and State of Kansas:

Your petitioner, L. S. Shields, administrator of the estate of Robert Titus, deceased, would respectfully represent to your honorable court that upon examination I find the estate of the said Robert Titus to be indebted to D. B. Miller, of the county of Reno and State of Kansas, in the sum of eight thousand three hundred and ninety-one dollars and seventy cents (8,391.70), and that the charges of administration amounts to the sum of — dollars; that there is no personal property, rights, or credits of any description or value whatsoever to pay said indebtedness, and your petitioner would therefore respectfully pray that your honorable court authorize the sale of the following-described real estate, being the property of the said Robert Titus, deceased, for the purpose of paying said indebtedness, to wit, being the northeast quarter of section twelve, town. twenty-three, of range six west, with all the appurtenances thereto belonging; that authority be granted to sell the above-described real estate at public sale, according to the requirements of the statutes in such cases made and provided and in such manner as the court may direct.

(Signed) L. S. SHIELDS,
Administrator of the Estate of Robert Titus, Deceased.

Subscribed and sworn to before me this the 23rd day of January, 1877.

G. V. RICKSECKER,
Probate Judge.

EXHIBIT "E."

STATE OF KANSAS, } ss:
Reno County, }

Know all men by these presents that whereas the probate court of Reno county, in the State of Kansas, did on the 23rd day of February, 1877, at the January term of said court, make an order authorizing the administrator of the estate of Robert Titus, deceased, to sell the real estate of the deceased, to wit, the northeast quarter of section twelve (12), township twenty-three (23), range six (6) west, at public sale, as required by law; that afterwards, on the 24th day of February, 1877, the said administrator of the said estate had the said real estate appraised by J. B. Brown, G. W. Hardy, and J. M. Jordon, three disinterested householders of the said Reno county, Kansas, and that afterwards, on the 7th day of April, 1877, said administrator sold all right, title, and interest of said estate in and to the above-described real estate to one D. B. Miller, of the said Reno county and State of Kansas, at and for the sum of three thousand dollars, in all things as ordered by said court, and that afterwards, to wit, on the 16th day of April, A. D. 1877, said administrator made a report of his proceedings under said order to said court, which report was on the 16th day of April, A. D. 1877, duly approved by said court, and said administrator was then and there ordered by said court to execute and deliver unto the said D. B. Miller a good and sufficient deed, conveying unto him all right, title, and interest of the estate of the said deceased in and to the real estate above described: Now, therefore, in consideration of the premises and of the said sum of three thousand dollars to me paid by the said D. B. Miller, of Reno county and State of Kansas, I, L. S. Shields, administrator of the estate of Robert Titus, deceased, do hereby bargain and sell and convey unto the said D. B. Miller, his heirs — assigns, all the right, title, and interest of the estate of said deceased in and to the following-described real estate in Reno county, Kansas, to wit: All the northeast quarter of section twelve (12), town. twenty-three (23), range six (6) west.

In testimony thereof I have subscribed my name this 16th day of April, 1877.

L. S. SHIELDS,
Administrator.

STATE OF KANSAS, } ss:
Reno County, }

On this 16th day of April, 1877, before me, a probate judge in and for said county, came L. S. Shields, to me personally known to be the identical person described in and who executed the above conveyance as a grantor, and acknowledged the same to be his own free act and deed.

G. V. RICKSECKER,
Probate Judge.

Entered on the transfer record on June 12th, 1877.

H. W. BEATTY,
County Cl'k.

Filed June 12th, '77, 9 a. m.

G. A. ATWOOD, *Reg.*

22 EXHIBIT "F."

This indenture made this 21st day of January 1882, between Delight Caldwell (formerly Titus) daughter and heir-at-law, of in and to the estate of Robert Titus deceased, late of Reno county Kansas, said Delight Caldwell now residing in Macomb county in the State of Michigan of the first part and John Caldwell of Macomb county in the State of Michigan of the second part, witnesseth:

That said party of the first part in consideration of the sum of one dollar to her in hand paid by said party of the second part the receipt of which is hereby confessed, acknowledged, does by these presents, grant bargain, sell and forever quitclaim unto said party of the second part, and heirs and assigns forever all my rights, title interests, claim, or demand in and to the real estate and property of said Robert Titus deceased, and to which he died seized, situated — being in the county of Reno and State of Kansas, and more particularly described, as the northeast quarter of section twelve (12), town. twenty-three (23) range six, (6) west, of the 6th principal meridian.

Together with all and singular the hereditaments and appurtenances thereto belonging, in anywise appertaining; to have and to hold the said real estate and property to the said party of the second part, to his heirs and assigns, to the sole and only proper use, benefit and behoof of said, the said party of the second part, his heirs and assigns forever.

In witness whereof the said party of the first part has hereunto set her hand and seal the day and year first above written.

her
DELIGHT x CALDWELL.
mark.

Signed, sealed, and delivered in the presence of—
W. H. CLARK, JR.
EMMA TUBBS.

STATE OF MICHIGAN, } ss:
Macomb County, }

On this 21st day of January, 1882, before me, the subscriber, a notary public in and for the county and State aforesaid, personally appeared Delight Caldwell, to me known to be the same person in and who executed the within instrument, who acknowledged the execution of the same to be her free act and deed.

[Seal Macomb County, Georgia.]

W. H. CLARK, JR.,
Notary Public.

23 EXHIBIT "G."

This indenture made this 9 day of June 1885, between Rachel Crandall, of the town of Ray, county of Macomb in the State of Michigan of the first part and John Caldwell, town of Ray, of Macomb county in the State of Michigan of the second part, witnesseth:

That said party of the first part in consideration of the sum of one dollar to her in hand paid by said party of the second part, the receipt of which is hereby confessed, acknowledged, do grant barter and sell and by these presents, remise release, and forever quitclaim unto said party of the second part his heirs and as-igns all those certain pieces and parcels of land, situated in the county of Reno and State of Kansas, and described as follows: Being the undivided one-fifth interest in and *both* estate of Robert Titus deceased and the land described as follows—, being the undivided one-fifth interest, in the northeast quarter of section twelve (12) town. twenty-three (23) south of range six (6) west of the 6th principal meridian.

To have and hold the said land to the said party of the second part and to his heirs and assigns to the sole and only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever. Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining.

In witness whereof the said party of the first part has hereunto set her hand the day and year first written above.

her
RACHEL x CRANDALL.
mark.

Signed, sealed, and delivered in presence of—
C. V. THORNINGTON.
J. L. STARKWEATHER.

STATE OF MICHIGAN, } ss:
Macomb County, }

Be it remembered that on this 9th day of June, A. D. 1885, before me, the subscriber, a notary public in and for the county and State aforesaid, personally appeared Rachel Crandall, known to me to be the same person who executed the within instrument of writing, and acknowledged the same to be her free act and deed.

[SEAL.] J. L. STARKWEATHER,
Notary Public, Macomb County, Michigan.

24 EXHIBIT "H."

This indenture made this 14th day of February 1882, between Melissa West child and heir-at-law, Betsey Hocks, deceased, formerly Betsy Titus who was the daughter and heir-at-law of Robert Titus deceased late of Reno county in the State of Kansas, of the first part

and John Caldwell of Macomb county, in the State of Michigan, of the second part, witnesseth: That her of the first part in consideration of the sum of one dollar to her in hand paid by said party of the second part, the receipt of which is hereby acknowledged does grant, bargain and sell by these presents, remise, release and forever quitclaim unto the said party of the second part his heirs and assigns, all my rights, title interest, claim or demand in and to the real estate and property of said Robert Titus deceased, and to which he died seized, situated and being in the county of Reno and State of Kansas, and more particularly described as the northeast quarter section 12 township 23, range 6, west. To have and to hold, the said real estate and property to the said party of the second part and to his heirs and assigns to the sole and only proper use, benefit and behoof, the said party of the second part, his heirs and assigns forever. Together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining forever.

In witness whereof the said party of the first part has hereunto set her hand the day and year first above written.

MRS. MELISSA WEST.

Signed and sealed, delivered in presence of—
CHARLES H. PARKER.
WM. H. CLARK, JR.

STATE OF MICHIGAN, } ss:
Macomb County, }

Be it remembered that on this 28th day of March, A. D. 1882, before me, the subscriber, a notary public in and for the county and State aforesaid, personally appeared Melissa West, known to me to be the same person described in and who executed the within instrument of writing, who acknowledged the same to be her free act and deed.

[SEAL.] WM. H. CLARK,
Notary Public, Macomb County, Michigan.

25 EXHIBIT "I."

This indenture made this 25th day of January, A. D. 1882, between Volney Hicks, and Ada Wade, children and heirs-at-law of Betsey Hicks, deceased, formerly Betsey Titus, who was the daughter of and heir-at-law of Robert Titus deceased, late of Reno county in the State of Kansas, of the first part and John Caldwell, of Macomb county in the State of Michigan of the second part, witnesseth, that said parties of the first part in consideration of the sum of one dollar to them in hand paid by said party of the second part, the receipt of which is hereby acknowledged, do grant barter and sell, by these presents, remise release and forever quitclaim unto said party of the second part, his heirs forever and assigns all of our right, title, interest, claim, or demand, in and to the real estate and property of said Robert Titus deceased, and to which he died

seized situated and being in the county of Reno and State of Kansas, and more particularly described as the northeast quarter of section 12 township twenty-three range 6 west.

To have and hold the said real estate and property to the said party of the second part, and to his heirs and assigns to the sole and only proper use, benefit and behoof, of the said party of the second part, his heirs and assigns forever, together with all and singular the hereditaments and appurtenances, thereunto belonging or in anywise appertaining.

In witness whereof the said parties of the first part have hereunto set their hands the day and year first above written.

her
VOLNEY x HICKS.
mark.
ADA WADE.

Signed, sealed, and delivered in presence of—
W. H. CLARK, JR.
EMMA TUBBS.

STATE OF MICHIGAN, } ss:
Macomb County, }

Be it remembered that on this 21st day of January, A. D. 1882, before me, the subscriber, a notary public in and for the county and State aforesaid, personally appeared Volney Hicks and Ada Wade, personally known to me to be the same persons described in and who executed the within instrument of writing, and who each acknowledged the same to be their free act and deed.

[SEAL.] W. H. CLARK, JR.,
Notary Public, Macomb County, Michigan.

26 EXHIBIT "J."

This indenture made this 14th day of February 1882, between Arabel Snyder child and heir-at-law of Betsey Hicks, deceased, formerly Betsey Titus, who was a daughter and heir-at-law of Robert Titus deceased, late of Reno county in the State of Kansas, of the first part and John C-lldwell of Macomb county in the State of Michigan of the second part, witnesseth, that said party of the first part in consideration of the sum of one dollar to her in hand paid by the said party of the second part the receipt of which is hereby confessed and acknowledged, does grant, bargain and sell, by these presents, remise release and forever quitclaim unto said party of the second part and to his heirs and assigns all of my right title interests claim or demand in and to the real estate of said Robert Titus deceased and to which he died seized situated and being in the county of Reno and State of Kansas, and more particularly described as the northeast quarter of section 12 town. 23 range 6 west.

To have and to hold the said real estate and property to the said party of the second part and his heirs and assigns to the sole and

only proper use benefit and behoof. And the said party of the second part his heirs and assigns forever. Together with all and singular, the hereditaments and appurtenances thereunto belonging or in anywise appertaining forever.

In witness whereof the said party of the first part has hereunto set her hand, the day and year first above written.

ARABELLA SNYDER.

Signed, sealed, and delivered in presence of—
MRS. MARIAH RUSH.
T. W. CROCKER.

STATE OF MICHIGAN, } ss:
Macomb County, }

Be it remembered that on this 16th day of February, A. D. 1882, before me, the subscriber, a notary public in and for the county and State aforesaid, personally appeared Arabella Snyder, personally known to me to be the same person described in and who executed the within instrument of writing, and who acknowledged the same to be her free act and deed.

T. W. CROCKER,
[SEAL.] *Notary Public, Macomb County, Michigan.*

27 In the District Court of the 9th Judicial District, Sitting in and for the County of Reno, Kansas.

JOHN CALDWELL, Plaintiff,
vs.
D. B. MILLER, L. B. MILLER, MARY GIBBONS, EMILY TUBBS, Amos Miller, Joseph Miller, James Miller, Frank Miller, William Miller, Robert Miller, Emily Miller, and Lettie Miller, Defendants.

Affidavit for Service by Publication.

STATE OF KANSAS, } ss:
Reno County, }

William E. Hutchinson, of lawful age, being duly sworn, deposes and says that he is one of the attorneys of the plaintiff in the above-entitled action, and that the said action has been commenced in the above court by the plaintiff to recover real property in the county of Reno, to wit, a part of the northeast quarter of section 12, township twenty-three, range 6 west, and in the State of Kansas, and for the determination of the rights and interest of the plaintiff in and to the said land; that the said defendants, Mary Gibbons, Emily Tubbs, Amos Miller, Joseph Miller, James Miller, Frank Miller, William Miller, Robert Miller, Emily Miller, Lettie Miller, are all non-residents of the State of Kansas, and that summons cannot be served on them in this State.

And that this affidavit is made to obtain service on them by publication.

WILLIAM E. HUTCHINSON.

Subscribed and sworn before me in and for the said county of Reno and State of Kansas this 14th day of July, 1885.

[SEAL.] JOHN B. VINCENT, *Clerk.*

Filed July 14th, 1885.

[SEAL.] JNO. B. VINCENT, *Clerk.*

28 *Notice.*

In the District Court of the 9th Judicial District, Sitting in and for Reno County, Kansas.

JOHN CALDWELL, Plaintiff,
vs.
D. B. MILLER, L. B. MILLER, MARY GIBBONS, EMILY TUBBS, Joseph Miller, Amos Miller, James Miller, Frank Miller, William Miller, Robert Miller, Emily Miller, and Lettie Miller, Defendants.

The above-named Mary Gibbons, Emily Tubbs, Amos Miller, Frank Miller, James Miller, Robert Miller, Joseph Miller, William Miller, Emily Miller, and Lettie Miller will take notice that they have been sued in the said court in an action entitled as above, and that unless they answer the petition of the plaintiff therein filed on or before the 26th day of August, 1885, the allegations in the petition will be taken as true and judgment will be rendered in favor of the plaintiff and against the defendants; that the plaintiff recover of the defendants an undivided three-fifths interest in the northeast quarter of section twelve, in township twenty-three, in range six west, in the county of Reno and State of Kansas; that the deed of D. B. Miller to said land by the probate court of said county be set aside, and that the said D. B. Miller and L. B. Miller be ordered to make plaintiff a deed to said undivided three-fifths interest in said land, and that if the said parties do not make such deed on or before a time to be fixed by the court, then that the sheriff of Reno county make to plaintiff a deed to said land, and also judgment that the said land be parti-oned, and that plaintiff's three-fifths interest in said land be set off to him, and also that plaintiff have and recover of defendants D. B. Miller and L. B. Miller the sum of twelve hundred and thirty dollars, with interest on the same, at the rate of seven per cent. per annum, from the first day of July, 1885, and also for costs of suit.

WHITESIDES & HUTCHINSON,
Att'ys for Pl'ff.

Attest:

[SEAL.] J. B. VINCENT, *Clerk.*

29 (All legal notices must be paid for when proof of publication is made. Cost of publication, $9.60.)

Proof of Publication.

STATE OF KANSAS, } ss:
Reno County, }

Grant Easley, of lawful age, being first duly sworn, says that he is foreman of the News, a weekly newspaper published in the city of Hutchinson, in the county and State aforesaid, and of general circulation therein, and that the attached notice was published in said newspaper 3 consecutive weeks, the first publication being on the 16th day of July, A. D. 1885, and the last publication on the 30th day of July, A. D. 1885.

GRANT EASLEY.

Sworn to before me and subscribed to in my presence this 18th day of January, A. D. 1886.

JOHN B. VINCENT,
Clerk District Court Reno Co., Kas.,
By J. P. DILLON, *Deputy.*

[SEAL.]

Filed January 8th, 1886.

JOHN B. VINCENT, *Clerk.*

In the District Court of Reno County, Kansas.

JOHN CALDWELL, Plaintiff,
vs.
D. B. MILLER *et al.*, Defendants. } No. 1694.

Demurrer.

Comes now the defendants, D. B. Miller and L. B. Miller, by their attorneys, Sheble and Vandeveer, and demur to the plaintiff's petition herein, and to each and every count thereof, for the reason that said petition does not nor does any count thereof state facts sufficient to constitute a cause of action against these said defendants or either of them.

SHEBLE & VANDEVEER,
Att'ys for Def'ts D. B. & L. B. Miller.

Filed July 29th, 1885.

JNO. B. VINCENT, *Clerk.*

30 In the District Court of Reno Co., Kansas.

JOHN CALDWELL, Plaintiff,
vs.
D. B. MILLER *et al.*, Defendants.

Motion.

Now comes this said defendant, Daniel B. Miller, by Sheble & Vandeveer, his attorneys, and represents that the said plaintiff is a non-resident of the State of Kansas, and as security for costs in this

case has deposited but the sum of $15.00 with the clerk of this court, and has given no other or further security therefor; that the costs in this case will probably reach the sum of $500.00. Said defendants therefore moves the court to require said plaintiff to *to* give additional and sufficient security for costs herein.

SHEBLE & VANDEVEER,
Att'ys for D. B. Miller.

STATE OF KANSAS, }
Reno County, } *ss:*

A. R. Sheble, being duly sworn, says that he is one of the attorneys for the within-named defendant, duly authorized in the premises; that the facts stated in the foregoing motion are true.

A. R. SHEBLE.

Sworn to before me and subscribed in my presence this 25th day of August, 1885.

[SEAL.] JOHN B. VINCENT, *Clerk.*

Filed August 26th, 1885.

JNO. B. VINCENT, *Clerk.*

JOHN CALDWELL, Pl'ff,
vs.
D. B. MILLER *et al.*, Def'ts. } No. 1694.

On this 7th day of October, 1885, the same being a day of regular September (1885) term of this court, this cause came duly on for hearing upon motion of defendant D. B. Miller to require plaintiff to give additional security for costs; he having duly considered the matter, doth consider — adjudge that plaintiff increase his deposit in the sum of $85.00, making a total deposit with the clerk in the sum of $100.00, or in lieu thereof give a good and sufficient bond for costs, as required by law, and that in default by plaintiff in requirement of this order within three days that this action be dismissed at plaintiff's cost.

L. HOUK, *Judge.*

Filed Oct. 7th, 1885.

JNO. B. VINCENT, *Clerk.*

31 In the District Court of Reno Co., Kansas.

JOHN CALDWELL, Plaintiff,
vs.
D. B. MILLER *et al.*, Def'ts.

This cause being heard on the demurrer to the petition, the court, — consideration thereof, overruled the same; to which ruling of the court in overruling defendants' demurrer the defendants except, and on motion of the defendants are allowed 30 days from this

12th day of October, 1885, to file answer herein, and plaintiff 10 days thereafter to reply.

WHITESIDES & HUTCHINSON,
Att'ys for Plaintiff.
SHEBLE, VANDEVEER AND
R. A. CAMPBELL, *Att'ys for Def'ts.*

Filed Oct. 12th, 1885.

JNO. B. VINCENT, *Clerk.*

In Dist. Court of Reno Co., Kas.

JOHN CALDWELL, Pl'ff,
vs.
D. B. MILLER, L. B. MILLER, *et al.*, Def'ts. } No. 1694.

Separate Answer of D. B. & L. B. Miller.

Come now D. B. Miller and L. B. Miller, his wife, two of the above-named defendants, and for answer of pl'ff's petition and each and every count thereof say they admit that they are in possession of the land in pl'ff's petition described and aver that they are the owners of said land in fee; and, further than this, these defendants deny each and every, all and singular, the allegations and averments in said petition contained.

SHEBLE & VANDEVEER,
R. A. CAMPBELL,
Att'ys for D. B. & L. B. Miller.

Filed Oct. 26th, 1885.

JNO. B. VINCENT, *Clerk.*

32 JOHN CALDWELL, Pl'ff,
vs.
D. B. MILLER, L. B. MILLER, *et al.*, Def'ts.

Petition for Removal to Cir. Ct. U. S., Dist. Kansas.

To said district court, Reno county, Kansas:

Your petitioners respectfully show to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum of or value of five hundred dollars ($500); that the controversy in said suit is between citizens of different States, and that the petitioners were at the time of the commencement of this suit and still are citizens of the State of Kansas, and that John Caldwell, the plaintiff, and —— Miller, —— Miller, —— Miller, —— Miller, —— Miller, —— Miller, —— Miller, codefendants herein with your petitioners, were then and still are citizens of the State of Michigan. Your petitioners state that in the *above* suit above mentioned there is a controversy which is wholly between citizens of different States and which can be fully determined as between them, to wit, a controversy between the said petitioners and the said John Caldwell, plaintiff, and the said —— Miller, ——

Miller, —— Miller, —— Miller, —— Miller, —— Miller, defendants, all of whom are jointly interested with said plaintiff, John Caldwell, as against your petitioners, and all of whom are residents and citizens of the State of Michigan, and your petitioners offer herewith a bond, with good and sufficient surety, for their entering in said circuit court of the United States on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto, and they pray this honorable court to proceed no farther herein, except to make the order of removal required by law and to accept the surety and bond and cause the record herein to be removed unto the said circuit court of the United States in and for the district of Kansas; and they will ever pray.

SHEBEL, VANDEVEER, R. A. CAMPBELL,
Att'ys for Petitioners.

STATE OF KANSAS, } ss:
Reno County, }

I, D. B. Miller, one of the petitioners herein, do say that I have heard read the foregoing petition and know the contents
33 thereof, and that the statements and allegations therein contained are true, as I verily believe.

D. B. MILLER.

Subscribed by the said D. B. Miller in my presence and by him sworn to before me this 7th day of December, A. D. 1885.

[SEAL.] JNO. B. VINCENT, *Clerk.*

Filed Dec. 7, 1885.

JNO. B. VINCENT, *Clerk.*

Know all men by these presents that *I*, D. B. Miller and L. B. Miller, as principal and as sureties, are held and firmly bound unto John Caldwell in the penal sum of five hundred dollars; — the payment whereof, well and truly to be made unto the said John Caldwell, heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, by these presents—

Yet upon these conditions: that the said D. B. Miller and L. B. Miller having petitioned the district court of Reno county, State of Kansas, for the removal of a certain cause therein pending, wherein John Caldwell, as plaintiff, and D. B. Miller and L. B. Miller *et al.* are defendants, to the circuit court of the United States in and for the district of Kansas: Now, if the said D. B. Miller and L. B. Miller, your petitioners, shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in said suit and shall well and truly pay all costs that may be awarded by the said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 7th day of December, A. D. 1885.

D. B. MILLER.
LOIS MILLER.
JAMES F. REDHEAD.

Filed Dec. 7th, 1885.

JNO. B. VINCENT, *Clerk.*

34 STATE OF KANSAS, } ss:
Reno County, }

Reno Co. Dist. Court.

JOHN CALDWELL, Pl'ff,
vs.
D. B. MILLER *et al.*, Def'ts.

Application for Removal.

Now, on this 7th day of December, 1885, the same being one of the days, September, 1885, adjourned term, comes the defendants D. B. Miller and L. B. Miller and presents their petition and bond and asks for a removal of the above cause from the district court of Reno county, State of Kansas, to the circuit court of the United States for the dist. of Kansas for the reasons in said petition set forth, and the court, after a partial consideration, continues the further hearing of said petition, — be continued until the January term, A. D. 1886.

W. & H., *For Pl'ff.*
S. V. & R. A. CAMPBELL,
For Def'ts Millers.

JOHN CALDWELL
vs.
D. B. MILLER *et al.*

Journal Entry on Petition for Removal.

Now, on this 7th day of December, 1885, the same being one of the days of the September, 1885, adjourned term, comes the defendants D. B. and L. B. Miller and present their petition and bond and ask for a removal of the above cause from the district court of Reno county, State of Kansas, to the circuit court of the United States for the dist. of Kansas for the reason in said petition set forth, and the court, after a partial consideration thereof, continues the further hearing of said petition, — be continued until the January term, A. D. 1886.

L. HOUK, *Judge.*

JOHN CALDWELL
vs.
D. B. MILLER *et al.*

Now, on 6th day of January, 1886, this cause, on application for removal, having been continued from the September, 1885, term of

said court, coming on for final hearing upon motion of said def'ts D. B. Miller and L. B. Miller, and the court, being fully advised, on consideration thereof doth overrule said application; to which order of court in overruling said application the said def'ts D. B. Miller and L. B. Miller excepts.

L. HOUK, *Judge.*

35 JOHN CALDWELL
vs.
D. B. MILLER, L. B. MILLER, *et al.*

Now, on this 14th day of January, 1886, it is agreed between the parties of the above-entitled action that this cause be continued till the next term of this court, and that if plaintiff desires he can file an amended petition in said cause in thirty-five days from this date, and that if an amended petition is so filed by pl'ff within said time defendants shall have 20 days thereafter to answer the same, pl'ff 10 days after the last date in which to reply; also that defendants D. B. & L. B. Miller may file an amended answer to the petition now on file; said amended answer, if so filed, to be filed before March 1st, 1886, and pl'ff shall have 10 days thereafter to reply or demur.

Filed January 14, 1886.

JNO. B. VINCENT, *Clerk.*

STATE OF KANSAS, } *ss:*
Reno County, }

In the District Court of said County.

JOHN CALDWELL, Plaintiff,
vs.
D. B. MILLER, L. B. MILLER, *et al.*, Defendants.

It appearing upon application of Vandeveer, Martin and Bollinger and Almerin Gillett, attorneys for defendants D. B. Miller and L. B. Miller, that the above-entitled suit now pending in this court is an action brought by the plaintiff *versus* the defendants to recover title to the northeast quarter of section number twelve, township number twenty-three south, range number six west, in Reno county, State of Kansas, and that it will be necessary and material in said suit to establish the identity of one Robert Titus as having served in the war of 1812 in a battalion of light dragoons of the State of Vermont, under command of Major or Lt. Col. James V. Bell, during some period of time during the year 1814, it is there- ordered that whatever, if any, evidence in regard to enlistment, descriptive roll, and service and payment and discharge is upon the records of the War or other departments of the
36 Government of the United States in regard to said matters be certified, upon payment of proper fees therefor, for the use of said defendants D. B. and L. B. Miller and their attorneys in this suit.

L. HOUK,
Judge District Court Reno County, State of Kansas.

I hereby certify that the signature of the above and foregoing instrument is the genuine signature of Hon. L. Houk, judge of the district court of Reno county, Kansas, and that said court is a court of record, having a seal.

Witness my hand and the seal of said court this 11th day of October, A. D. 1886.

[SEAL.] JNO. B. VINCENT,
Clerk of District Court Reno County, State of Kansas.

In the District Court of Reno Co., Kas.

JOHN CALDWELL, Pl'ff,
vs.
D. B. MILLER, L. B. MILLER, *et al.*, Def'ts.

It is hereby stipulated and agreed between pl'ff and def'ts — above cause that pl'ff have until March 10th, 1886, to amend his petition and def'ts until March 17th, 1886, to file answer thereto.

VANDEVEER & MARTIN AND ADY & JAMES McINSTRY,
Att'ys for Def'ts.
WHITESIDES & HUTCHINSON,
Att'ys for Pl'ff.

37 In the District Court of Reno Co., Kas.

JOHN CALDWELL
vs.
D. B. MILLER *et al.*

The above cause continued, by consent, to the Sept., 1886, term of court.

WHITESIDE & HUTCHINSON,
Att'ys for Pl'ff.
VANDEVEER & MARTIN,
Att'ys for D. B. & L. B. Miller.

This 4, 20, '86.
Filed May 17th, 1886.

JNO. B. VINCENT, *Clerk.*

In the District Court of Reno County, State of Kansas.

JOHN CALDWELL, Plaintiff,
versus
D. B. MILLER, L. B. MILLER, MARY GIBBONS, EMILY TUBBS, AMOS Miller, —— Miller, —— Miller, —— Miller, —— Miller, —— Miller, and —— Miller, Defendants.

Comes now the defendants D. B. Miller and moves the court here for leave to amend his answer herein by filing a supplemental answer setting up facts which have come to his knowledge since the

commencement of this present term of this court, namely, that there is an heir to Robert Titus who is not now a party to this suit and who is an indispensible party to this action and without whose presence no final determination of the matter in controversy can be had. This motion is supported by affidavit of D. B. Miller now on file.

VANDEVEER, MARTIN & BALLINGER,
Attorneys for D. B. Miller.

Filed Sept. 22nd, 1886.

JNO. B. VINCENT, *Clerk.*

38 In the District Court of Reno County, State of Kansas.

JOHN CALDWELL, Plaintiff,
versus
D. B. MILLER, L. B. MILLER, MARY GIBBONS, EMILY TUBBS, AMOS Miller, —— Miller, —— Miller, —— Miller, —— Miller, —— Miller, and —— Miller, Defendants.

STATE OF KANSAS, } ss:
County of Reno, }

D. B. Miller, of lawful age, being first duly sworn, on his oath says that he is one of the defendants in the above-entitled case; that Robert Titus, the party named in plaintiff's petition, had a son named Alden Titus; said Alden Titus resided in Charlestown, in the State of Massachusetts, and there died about the year 1876, leaving two children, George and Ella, and a widow and a son of another son of said Alden Titus, who are heirs of the said Robert Titus and are indispensible parties to this suit. Affiant cannot now recall the names of the deceased son of the said Alden Titus. He died about the year A. D. 1868. These facts have come to the knowledge of this affiant since the commencement of this present term of this court.

D. B. MILLER.

Subscribed in my presence and sworn to before me this 22nd day of September, A. D. 1886.

BRUCE EMISON,
Notary Public.

[SEAL.]

Commission expires June 30, 1890.

Filed Sept. 22nd, 1886.

JNO. B. VINCENT, *Clerk.*

39 In the District Court of Reno County, State of Kansas.

JOHN CALDWELL, Pl'ff,
versus
D. B. MILLER, L. B. MILLER, MARY GIBBONS, EMILY TUBBS, Amos Miller, —— Miller, —— Miller, —— Miller, —— Miller, —— Miller, and —— Miller, Defendants.

STATE OF KANSAS, *County of Reno,* } *ss:*

D. B. Miller, being first duly sworn, on his oath says that he is one of the defendants in the above-entitled action; that he cannot safely go to trial of said cause at this term of the court for the want of material evidence, which he has been unable to procure; that this defendant expects to be able to prove by one Ella Titus, who resides in the city of Charlestown, in the State of Mass., the following facts, and that the said Ella Titus will testify and swear as follows, to wit: My name is Ella Titus. I am fifty years of age and reside in the city of Charlestown, in the State of Mass. My father's name was Alden Titus, and he was born in Clarendon, in Rutland county, State of Vermont, about the year 1810 or 1811. My father's father—my grandfather—was Robert Titus. My father's mother—my grandmother—was Phœba Titus. They were married in Rutland county, Vermont, about two years prior to the birth of my father, Alden Titus. My grandfather, Robert Titus, lived with my grandmother, Phœba Titus, until after the commencement of the war of 1812. He went into that war, and upon coming out he went West and was not hear- of for many years. My grandmother, Phœba Titus, supposing that my grandfather, Robert Titus, was dead, on April 18th, 1821, married Ephriam Jackson. She never had any divorce from Robert Titus, and she never had any other children than my father by Robert Titus. All of the above has been told me at various times by my grandmother, Phœba Titus or Phœba Jackson. My said grandmother, Phœba Titus or Phœba Jackson, lived in my father's family, and I was acquainted with her from an infant in arms almost up to her death, which occurred at Brandon, Vermont, February 10th, 1860. My father was married about A. D. 1830 or 1831, and there was born of that marriage three chil-
40 dren, two boys and one girl. I am that girl, one brother, George, older than I and one brother younger. The older brother, George, is still living at Charlestown with me. The younger brother died about A. D. 1868, leaving a widow and one son, an only child. My mother died in 1872 and my father died in 1876 in this place, Charlestown, Massachusetts. My father left no will, but died intestate; and further deponent saith not.

Affiant believes that the said witness will testify to said facts, and that the same are true. Affiant expects to prove by George Titus the following facts, and that the said George Titus will testify and swear as follows: My name is George Titus and am 52 years of age, and reside at Charlestown, in the State of Mass. Ella Titus is my sister. My father's name was Alden Titus, and he was born in

Clarendon, in Rutland county, State of Vermont, about the year 1810. My father's father was Robert Titus. My father's mother was my grandmother, *was* Phœba Titus. They were married in Rutland county, Vermont, about two years prior to the birth of my father. My grandfather, Robert Titus, lived with my grandmother, Phœba Titus, until after the commencement of the war of 1812. He went into that war and when he came out he went West and was not heard of for many years. My grandmother, Phœbe Titus, supposing that my grandfather was dead, on April 18th, 1821, married Ephriam Jackson. She never had any divorce from Robert Titus. She never had any children than my father by Robert Titus. My grandmother and my father both heard afterwards that Robert Titus — at the West, at one time in western New York *at* later at Macomb county, in the State of Michigan. The above facts have been told me at various times by my said grandmother, Phœba Jackson, and by my father, Alden Titus. My grandmother, Phœba Jackson, lived in my father's family, and I was well acquainted with her from the time I was a small child until her death, in 1860. My mother died in 1872; my father in 1876, at Charlestown, Mass. He was a widower at the time of his death, never having married again after the death of my mother. He left no will, but died intestate. My grandmother's maiden name was Phœba Watkins. Further deponent saith not.

Affiant believes that the said witness will testify to said facts and he believes the said facts to be true. Affiant also expects to
41 be able to procure record evidence of the said marriage of the said Robert Titus and the said Phœba Titus, *née* Watkins. Affiant has just learned within the last week that such recorded evidence exists in Rutland county, State of Vermont. Affiant says that the foregoing testimony is material for the reason that the said plaintiff's claim is based on the theory that said Robert Titus had no other children than those mentioned in the petition. Affiant says that he did not know of the existence of the aforesaid evidence until since the commencement of this term of this court and too late to take any depositions for this term of court.

D. B. MILLER.

Subscribed and sworn to before me this 23rd day of September, A. D. 1886.

L. HOUK, *Judg-, etc.*

Filed Sept. 25, 1886.

JNO. B. VINCENT, *Clerk.*

JOHN CALDWELL, Pl'ff,
vs.
D. B. MILLER & L. B. MILLER *et al.*, Def'ts.

Now, on this 25th day of September, 1886, at the September term, 1886, of this court, appeared the said plaintiff, John Caldwell, by Whitesides & Hutchinson, his attorneys, and defendants D. B. Miller and L. B. Miller, by Vandeveer & Gillett, *his* attorneys; and the

motion of said defendants for a continuance being *agreed* by counsel and considered by the court and plaintiff not consenting to the reading of said showing as a deposition, it is hereby ordered that said cause be, and hereby is, continued until the next term of this court; to all of which the plaintiff at the time excepted.

W. & H.,
For Plaintiff.

42 In the District Court of Reno Co., Kansas.

JOHN CALDWELL, Plaintiff,
vs.
D. B. MILLER *et al.*, Defendants.

Now, on this 25th day of September, 1886, appeared the plaintiff, John Caldwell, by Whiteside & Hutchinson, his attorneys, and said defendant D. B. Miller, by his attorneys, Vandeveer & Gillett; and this cause coming on to be heard upon the said defendant Miller's application for leave to file an amended answer herein, and the court, having heard the said motion upon affidavit and ot-er evidence, grants the same, and said amended answer is thereupon filed instanter; to all of which plaintiff objects and excepts.

W. & H., *For Pl'ff.*

In the District Court of Reno County, State of Kansas.

JOHN CALDWELL, Plaintiff,
versus
D. B. MILLER, L. B. MILLER, MARY GIBBONS, EMILY TUBBS, AMOS Miller, —— Miller, —— Miller, —— Miller, —— Miller, —— Miller, and —— Miller, Defendants.

Amended Answer of D. B. Miller.

The defendant D. B. Miller, for an amended and supplemental answer to his answer herein filed on the — day of October, A. D. 1885, by leave of court first obtained, says that he denies each and every, all and singular, the allegations and averments in plaintiff's petition contained.

Second. For a second and further amended answer this defendant says that there is a defect of parties in this, to wit: In the year 1808 said Robert Titus mentioned in plaintiff's petition was lawfully married at Rutland county, in the State of Vermont, to one Phœba Watkins; that there was issue of said marriage, to wit, a son, named Alden Titus, who was born about the year 1810; that said Alden Titus was lawfully married on, to wit, in the year 1830 or
43 1831, and had born to him from that marriage three children, to wit, George, Ella, and Eugene Henry; that said George and Ella are still living; that said Eugene Henry deceased about July 21st, 1876, intestate, leaving a widow and one son; that the said Alden Titus died intestate at Charlestown, in the State of Mass., on the 10th day of September, 1876, leaving his only heirs-

at-law his widow, his said son and daughter, George and Ella, and the widow and son of his deceased son, Eugene Henry; that the widow of said Alden Titus never married again and died intestate of August 26, 1881; that she never had any children other than those above named as heirs of Alden Titus, who were also her heirs; that the said heirs now reside at Charlestown, in the State of Mass.; and this defendant further avers that the said heirs are the only heirs of the said Robert Titus, deceased.

VANDEVEER, MARTIN & BALLINGER,
Att'ys for D. B. Miller.

Filed Sept. 26th, 1886.

JNO. B. VINCENT, *Clerk.*

JOHN CALDWELL, Pl'ff,
vs.
D. B. MILLER, L. B. MILLER, *et al.*, Def'ts.

Now, on this 25th day of September, A. D. 1886, appeared the said plaintiff, by Whiteside & Hutchinson, his attorneys, and the defendant D. B. Miller, by Vandeveer & Gillett, his attorneys, upon the pl'ff's motion to strike defendant's, D. B. Miller's, amended answer from the files, and, after hearing the same, is argued by counsel and considered by the court and is by the court overruled; to which ruling the plaintiff at the time excepted.

W. & H., *For Pl'ff.*

44 In the District Court of Reno County, Kansas.

JOHN CALDWELL, Pl'ff,
vs.
D. B. MILLER *et al.*, Def'ts.

Stipulation.

It is hereby stipulated by the parties to this action that pl'ff may have until the 5th day of November, 1886, to plead to the amended answer of the defendant D. B. Miller.

VANDEVEER, MARTIN & BALLINGER,
Att'ys for D. B. Miller.

Filed Nov. 6th, 1886.

JNO. B. VINCENT, *Clerk.*

In the District Court of Reno County, Kansas.

JOHN CALDWELL, Pl'ff,
vs.
D. B. MILLER *et al.*, Def'ts.

Demurrer.

Now comes plaintiff in the above-entitled cause and demurs to the amended answer of def'ts D. B. Miller, herein filed, for the

reason that said answer does not state facts sufficient to constitute a defense to plaintiff's cause of action as alleged in his petition.

WHITESIDE & HUTCHINSON,
Att'ys for Pl'ff.

Filed Nov. 6th, 1886.

JNO. B. VINCENT, *Clerk.*

45 JOHN CALDWELL, Pl'ff,
vs.
D. B. MILLER, L. B. MILLER, *et al.*, Def'ts.

On this 6th day of January, 1887, same being a day of the regular January, 1887, term of this court, leave is granted defendant D. B. Miller, upon application duly presented, to file supplemental answer; to which pl'ff excepted; plaintiff to have until Monday, January 10th, 1887, in which to further plead.

WHITESIDE & HUTCHINSON,
Att'ys for Pl'ff.

V. &. M., *For D. B. Miller.*

Filed January 6th, 1887.

JNO. B. VINCENT, *Clerk.*

In the District Court of Reno County, Kansas.

JOHN CALDWELL, Pl'ff,
vs.
D. B. MILLER *et al.*, Def'ts.

Supplemental Answer of D. B. Miller.

Now comes the said defendant D. B. Miller and for his supplemental answer alleges that he makes by reference both his former answer and his amended answer a part of this supplemental answer as fully as if copied in full herein, and, further, by way of supplemental answer says that the said land in controversy was entered as a pre-emption by Robert Titus in the year 1871 in the United States land office; that Robert Titus died in the same year prior to consum-ating his said entry, and that defendant as administrator paid the money from his own funds to perfect said entry—amount, $400 cash—and was to large cost and expense in addition thereto; that the said estate was utterly insolvent and had no money with which to pay the same, and the defendant has never been paid any part thereof; that said entry was consum-ated and patent was issued in the name of the heirs of Robert Titus, in accordance with the provision of section 2269, Revised Statutes U. S. of A. D. 1878, which section is in words following, to wit: Where a party entitled to claim the benefit of the pre-emption laws dies before consum-ating his claim by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party or any one of the heirs to file the necessary papers to complete the same; that such entry in such

cases shall be made in favor of the heirs of the deceased pre-emptor and the patent therein shall cause the title to issue to such heirs
46 as if their names had been specially mentioned; that the sole and only heir of the said Robert Titus, within the true intent and meaning of the said act of Congress, was Alden Wheeler Titus, who died in 1876, intestate, at Charlestown, Mass.; that since the last term of this court this defendant has procured conveyance from all the heirs of said Alden W. Titus, deceased, and is thereby, as against this plaintiff, the owner of the said land under said act of Congress. Wherefore he prays that plaintiff's said action be dismissed at his costs.

VANDEVEER & MARTIN &
ELMERIN GILLETT,
Att'ys for Def't D. B. Miller.

Filed Jan. 6, 1887.

JNO. B. VINCENT, *Clerk.*

In the District Court of Reno Co., Kansas.

JOHN CALDWELL
vs.
D. B. MILLER *et al.*

Motion.

Now comes pl'ff and moves the court to strike out all that portion of D. B. Miller's last supplemental answer, filed in said court January 6th, 1887, wherein the word "says," in the 6th line thereof and the 26th line of said answer, also the 35th, 36th, and 37th lines thereof, also the first and 2nd Ans., made a part of said alleged supplemental answer, for the reason that said portions of said def't's — are prejudicial, redundency, and that the statements, if they mean anything, *they* are intended and do change the nature of def't's defense in this action, and for the further reasons that the said allegations contain nothing in the nature of supplemental answer and are not supplemental.

WHITESIDE & HUTCHINSON,
Att'ys for Pl'ff.

Filed Jan. 10th, 1887.

JNO. B. VINCENT, *Clerk.*

47 In Dist. Court of Reno Co., Kansas.

JOHN CALDWELL
vs.
D. B. MILLER and L. B. MILLER.

Demurrer.

Now comes plaintiff in the above cause and demurs to the answer of def't D. B. Miller and each count thereof, for the reason:

First. That the said answer and no count thereof states facts sufficient to constitute a defense to pl'ff's —.

Second. That the said defenses are repugnant to and discordant with each other.

WHITESDIE & HUTCHINSON,
Att'ys for Pl'ff.

Filed Jan. 11th, 1887.

JOHN B. VINCENT, *Clerk.*

JOHN CALDWELL, Pl'ff,
vs.
D. B. MILLER, L. B. MILLER, *et al.*, Def'ts.

Now, on this 11th day of January, A. D. 1887, the same being a day of the regular January, A. D. 1887, term of this court, this cause came duly on for hearing by the court upon motion by plaintiff to strike out certain portions of the defendant D. B. Miller's supplemental answer, Messrs. Whiteside & Hutchinson appearing for plaintiff and Messrs. Vandeveer & Martin for defendant D. B. Miller. After argument of counsel it is by the court considered and ordered that the following facts and portions of said supplemental answer be, and are hereby, stricken out, viz: Commencing with the word alleges, in the second line, down to and including the word "answer," in 6th line of supplemental answer; also commencing with the word "from," in the 11th line, down to and including the word "funds," in said 11th line, and also commencing with the word "amount," in 12th line, down to and including the word "thereof," in the 16th line of said supplemental answer; to
48 which ruling and order of the court the def't D. B. Miller excepts.

Thereupon pl'ff filed his demurrer to answer of D. B. Miller, the same coming immediately on for hearing by the court; and the court, having heard arguments of counsel and being fully advised, doth overrule said demurrer; to which ruling and holding of the court the pl'ff excepts. Leave is granted by the court to pl'ff to file a reply instanter.

WHITESIDE & HUTCHINSON,
Att'ys for Pl'ff.
V. & M., *For Def't D. B. Miller.*

Filed Jan. 12th, 1887.

JNO. B. VINCENT, *Clerk.*

In the District Court of Reno Co., Kansas.

JOHN CALDWELL, Pl'ff,
vs.
D. B. MILLER and L. B. MILLER, Def'ts.

Now comes pl'ff in the above cause and in reply to the answer of def't *and* says he denies each and every, all and singular, the allegations therein contained, with the facts set up in the plaintiff's petition. 2nd. Also pl'ff says that if def't should prove, over the denial

of pl'ff, which is made a part of this count, that Robert Titus was married in Vermont and had an heir, to wit, Alden W. Titus, then that it simply adds one more to the heirs mentioned by pl'ff in his petition; that the said Robert Titus was, whether divorced or not from the said alleged first wife, married to the mother of the heirs mentioned in pl'ff's petition and lived with her openly and notoriously as man and wife and had by her the said heirs mentioned in pl'ff's petition and always recognized them as his heirs and children and as with their mother constituting his sole and only family.

Wherefore pl'ff prays judgment as before.

WHITESIDE & HUTCHINSON,
Att'ys for Pl'ff.

Filed Jan. 24th, 1887.

JNO. B. VINCENT, *Clerk.*

49 JOHN CALDWELL, Pl'ff,
vs.
D. B. MILLER, L. B. MILLER, *et al.*, Def'ts.

Now, on this 24th day of January, 1887, at the —— term of this court, appeared the plaintiff, John Caldwell, in person and by Whiteside & Hutchinson, his attorneys, and said defendants, D. B. & L. B. Miller, by Vandeveer & Martin and Almerin Gillet, their attorneys, the other defendants failing to appear after having been duly served with notice in this case; and, this case coming on regularly for trial, a jury is by agreement of parties waived and the trial submitted to the court, and the court, having heard the evidence of the parties and argument of counsel, after being requested by both parties to find separately the facts and law, takes the case under advisement until the 6th day of April of this term of this court.

And now, to wit, on this 6th day of April, the said parties appeared as before, and the court, upon due consideration, filed his findings of facts and law separately in words and figures following, to wit:

JOHN CALDWELL, Pl'ff,
vs.
D. B. MILLER *et al.*, Def'ts.

The court finds as the facts in this case:

First. That on January first, 1809, one Robert Titus, mentioned in plaintiff's petition, was lawfully married, at Sudbury, in Rutland county, Vermont, to one Phœba Thomas, and that in October, A. D. 1810, there was born as the issue of that marriage a son, Alden Wheeler Titus, who was the only issue of that marriage.

Second. That after the birth of said son, Alden Wheeler Titus, the said Robert Titus abandoned his said wife and son and went into the war of 1812 and never lived with them any more.

Third. That said Robert Titus went from said war to East Bloomfield, in Ontario county, in the State of New York, and on July 14th, A. D. 1818, without having been divorced from said Phœba, married Miriam Lee, by whom he had five children thereafter born, viz:

Benjamin, a son; Betsey, a daughter; Rachel, a daughter; Delight, a daughter; Lois, a daughter.

Fourth. That said Robert Titus thereafter, about the year
50 A. D. 1832, removed from Ontario county, New York, to Lenox, Macomb county, Michigan.

Fifth. That said defendant, Lois Miller, is the wife of defendant D. B. Miller and is the youngest daughter of said Robert Titus and Miriam Lee.

Sixth. That said Robert Titus in the year A. D. 1850 came to live with said D. B. Miller and Lois Miller, his wife, and continued to live with them from that date until his death, in 1871.

Seventh. That said D. B. Miller and his wife Lois and said Robert Titus came to Reno county, Kansas, from Will county, in the State of Illinois, and setted there in the year A. D. 1871.

Eighth. That said Robert Titus on July 10th, 1871, made a pre-emption settlement upon the land in controversy in this suit, viz., N. E. ¼ sec. 12, t'p 23, R. 6 west, Reno county, Kansas, and thereafter, on September 8th, 1871, died, not having completed his pre-emption as required by act of Congress (of March 3rd, 1843, sec. 2269, Revised Statutes U. S. of 1878).

Ninth. Said Robert Titus died intestate and utterly without any money or property whatever. Upon his death said D. B. Miller was by the probate court of Reno county, Kansas, appointed administrator of said Robert Titus, deceased, and with his own money caused said pre-emption to be completed, paying the double minimum price for said land to the Government, viz., $400.00. This was done in the year 1871.

Tenth. That on the completing of said pre-emption by said D. B. Miller as administrator a patent for said land was issued by the United States under and in accordance with section 2269, Revised Statutes U. S., a copy of which is hereunto annexed, marked Exhibit "A," and made a part of these findings.

11th. That said Robert Titus died in Reno county, Kansas, intestate, on September 8th, 1871.

12th. That said Miriam Lee died intestate in the year A. D. 1853.

13. That his said wife, Pheoba Thomas Titus died in Rutland county, Vt., in the year A. D. 1860.

14. That said Alden W. Titus, son of said Robert and Phœba Titus, died in Charlestown, Mass., in the year A. D. 1876, intestate, leaving heirs.

16. That said defendaant, D. B. Miller, has purchased from said heirs of Alden W. Titus and, under proper conveyances from them, is the owner of all the rights, title, and interest in said land which inured to the said Alden W. Titus's benefit as the heir of said Robert Titus under said patent.

17. That plaintiff has conveyances from the following aforesaid named children of said Robert Titus and Miriam Lee, viz.,
51 Delight, intermarried with Caldwell, and Rachel, intermarried with Crandall, conveying to him whatever title they had in said land in controversy.

18. That said Betsey intermarried with Nathan Hicks, died, to wit. on the — day of ——, —, and left her surviving and who are still living, Nathan Hicks, her husband; her son, Volney Hicks; her daughter Melissa West, her daughter Ada Wade, and her daughter Arabel Snyder.

19. That said plaintiff has procured and has from said Volney, Melissa, Ada, Arabel deeds of conveyance conveying to him all their several interests in the land in controversy and from James and Joseph Miller.

20. Said D. B. Miller has procured from said Nathan Hicks and has a deed of conveyance conveying to him all the right, title, and interest which said Nathan Hicks had in said premises as the surviving husband of said daughter, Betsey.

21. That said Benjamin Titus died in the year A. D. 1852, and left his widow, who is still living, and three daughters, two of whom are still living; the other daughter, Elmira, married Amos Miller and had seven children; said Elmira died in the year A. D. 1885, leaving surviving her her said husband and the said seven children, all of whom are still living.

23. That the said defendant D. B. Miller has proper conveyance of the land in controversy from said Amos Miller and from three of the said sons of Elmira, viz., William, conveying to him all the right, title, and interest in said land, if any, which they were respectively entitled to as heirs of said Benjamin Titus, deceased.

24. That said children of Robert Titus and Miriam Lee were notoriously recognized by Robert Titus as his own, and no question ever raised as to their legitimacy until in this suit.

25. Plaintiff demanded to be let into possession March 4th, 1885.

26. If the Miriam Lee children of Robert Titus are heirs within the meaning of the act of Congress, sec. 2269 U. S. Revised Statutes, 1878, then the plaintiff is entitled to receive an undivided $\frac{1}{25}$ of the said land and damages for its detention since that time, at the rate of $41.67 per year.

The said D. B. Miller claims all of the said land under the said act of Congress and under the said conveyances of said legitimate heirs of said Robert Titus to him, and if legitimate children only are the heirs under said act of Congress, then said defendants are entitled to recover.

L. HOUK, *Judge.*

As conclusions of law from the foregoing findings of fact, the court finds for the defendants; to all of which plaintiff excepts.

L. HOUK, *Judge.*

52 It is thereupon by the court considered, ordered, and adjudged that the said defendant D. B. Miller is the owner in fee simple absolute of all the land described in said plaintiff's petition, to wit, the northeast quarter of section number twelve (12), township number twenty-three (23) south, range number six (6) west, in the county of Reno and State of Kansas, and lawfully in possession of the same, and that said defendants, D. B. Miller and L. B.

Miller, were at the commencement of this suit and are still in lawful possession of the same; that said defendants, D. B. Miller and L. B. Miller, go hence without day and recover of and from the said plaintiff their costs herein, taxed at the sum of — dollars, and hereof let execution issue; to all of which plaintiff duly excepted.

L. HOUK, *Judge.*

EXHIBIT "A" TO FINDINGS.

Certificate No. 593.

The United States of America to all to whom these presents shall come, Greeting:

Whereas D. B. Miller, administrator for the heirs of Robert Titus, deceased, of Reno county, Kansas, has deposited in the General Land Office of the United States a certificate of the register of the land office at Wichita, Kansas, whereby it appears that full payment has been made by the said D. B. Miller, administrator, according to the provisions of the act of Congress of the 24th day of April, 1820, entitled An act making further provisions for the sale of the public lands, for the northeast quarter of section twelve, township twenty-three, range six west, in the district of lands subject to sale at Wichita, Kansas, containing one hundred and sixty acres according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said D. B. Miller, administrator:

Now know ye that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such cases made and provided, have given and granted and
53 by these presents do give and grant unto the said heirs of Robert Titus, deceased, and to their heirs the said tract above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said heirs of Robert Titus, deceased, and to their heirs and assigns forever.

In testimony whereof I, Ulys-es S. Grant, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the 20th day of April, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-eighth.

By the President:

U. S. GRANT,
By A. WILLIAMSON, *Secretary.*

Recorded in volume 1, page 386.

[Seal General Land Office U. S.]

L. K. LIPPENCOTT,
Recorder of the General Land Office.

Copy of patent referred to in and made part of findings as Exhibit "A."

L. HOUK.

Filed April 6th, 1887.

JNO. B. VINCENT, *Clerk.*

In the District Court of Reno Co., Kansas.

JOHN CALDWELL
versus
D. B. MILLER, L. B. MILLER, *et al.*

Motion for New Trial.

Now comes plaintiff in the above cause and moves the court to set aside the findings of fact and conclusions of law in the above-entitled cause, also vacate the judgment and award a new trial, for the following reasons:

First. Irregularity in the proceedings of the court and abuse of discretion, by which pl'ff was prevented from having a fair trial.

Second. Accident or surprise against which ordinary prudence could not guard.

Third. That the evidence and findings were not sustained by sufficient evidence and are contrary to law.

Fourth. Errors of law occurring at the trial and excepted to by party making application.

Fifth. Newly discovered evidence material to pl'ff which he could not obtain with reasonable diligence and prudence at the trial.

HUTCHINSON & WHITESIDE,
Att'ys for Pl'ff.

Filed April 8th, 1887.

JNO. B. VINCENT, *Clerk.*

54 JOHN CALDWELL, Pl'ff,
vs.
D. B. MILLER, L. B. MILLER, *et al.*, Def'ts.

Now, on this 13th day of April, A. D. 1887, at the January term, 1887, of this court, appeared the said plaintiff, by Whiteside & Hutchinson, his attorneys, and the defendants D. B. & L. B. Miller, by Vandeveer & Martin and Elmirim Gillett, their att'ys, and the said plaintiff's motion herein filed on April 8th, 1887, for a new trial coming on to be heard was argued by counsel, considered by court, and was by the court overruled; to which ruling of the court the said plaintiff at the time excepted, and therefore the court gives the plaintiff twenty days from this date in which to make and serve a case made for the supreme court, and the defendant twenty days thereafter in which to make and serve amendments thereto, and the case made to be thereafter settled by the judge upon notice.

JOHN CALDWELL, Pl'ff,
vs.
D. B. MILLER, L. B. MILLER, *et al.*, Def'ts. } No. —.

On this 21st day of April, 1887, same being a day of the April special term of this court, it is ordered by the court that the clerk of this court do make a complete record of this cause as is provided by law.

Approved.

L. HOUK, *Judge.*

Filed April 21st, 1887.

JNO. B. VINCENT, *Clerk.*

Approved.

55 THE STATE OF KANSAS, } ss:
Ninth Judicial District, Reno County,

I, John B. Vincent, clerk of the district court of the ninth judicial district of the State of Kansas, sitting within and for the county aforesaid, do hereby certify the above and foregoing to be a true, full, and complete copy of all papers in case of John Caldwell *vs.* D. B. Miller and L. B. Miller *et al.* and a full, true, and complete copy and transcript of the record in the therein-entitled cause as the same remains of record in my office.

Witness my hand and the seal of said court, affixed at my office, in Hutchinson, this 16th day of March, A. D. 1888.

JNO. B. VINCENT,
[SEAL.] *Clerk District Court.*

Endorsed on back: District court, Reno county, Kansas. John Caldwell, plaintiff, *vs.* D. B. Miller *et al.*, defendants.

56 And afterwards, on the 8th day of January, 1890, the same being one of the regular judicial days of the January term, A. D. 1890, of the supreme court of the State of Kansas, before said court, in session at the supreme court room in the city of Topeka—present, Honorable Albert H. Horton, chief justice; Honorable Daniel M. Valentine and Honorable William A. Johnston, associate justices, and C. J. Brown, clerk of said court—the following proceeding, among others, was had and entered of record as follows, to wit:

JOHN CALDWELL, Plaintiff in Error,
vs.
D. B. MILLER and L. R. MILLER, Defendants in Error. } No. 5159.

This cause comes on to be heard on the petition in error and the transcript of the record of the district court of Reno county, and thereupon, after oral argument by W. E. Brown, attorney for plaintiff in error, and by A. Gillett, attorney for defendants in error, said cause was submitted on brief of counsel for plaintiff in error and taken under advisement by the court.

The defendants in error are given 20 days from this date within which to serve and file brief, and plaintiff in error is allowed ten days thereafter within which to file brief in reply.

57 And afterwards, on the 10th day of May, 1890, the same being one of the regular judicial days of the January term, A. D. 1890, of the supreme court of the State of Kansas, before said court, in session at the supreme court room in the city of Topeka—present, Honorable Albert H. Horton, chief justice; Honorable Daniel M. Valentine and Honorable William A. Johnston, associate justices, and C. J. Brown, clerk of said court—the following proceeding, among others, was had and entered of record as follows, to wit:

JOHN CALDWELL, Plaintiff in Error,
vs.
D. B. MILLER and L. R. MILLER, Defendants in Error.

This cause comes on for decision, and thereupon it is ordered and adjudged that the judgment of the court below be reversed, and that the cause be remanded with the direction to the court below to enter judgment upon the findings of fact in favor of John Caldwell and against the defendants for the undivided thirteen twenty-eighths of the land and damages for its detention from March 4th, 1885, at the rate of $41.67 per year. It is further ordered that the defendants in error pay the costs of this case in this court, taxed at $—, and hereof let execution issue.

58 And also, on the 10th day of May, 1890, there was filed in the office of the clerk of said court the syllabus and opinion of the court in said cause, which is in the words and figures as follows, to wit:

58½ JOHN CALDWELL
vs.
D. B. MILLER & L. B. MILLER. } No. 5159.

Error from Reno county. Reversed.

Syllabus. By the Court—Horton, C. J.

Where a party entitled to the benefits of the pre-emption laws of the United States makes a pre-emption filing in this State, but dies before consum-ating his claim and his administrator files the necessary papers to complete the same, and upon payment for the land obtains from the United States a patent granting the land unto the "heirs of the deceased pre-emptor," the word "heirs" in the patent is to be construed with reference to the laws of this State, and whoever under the laws of this State would have inherited from the deceased pre-emptor are the persons to whose benefit the land granted by the patent inures.

2. Under the statutes of Kansas illegitimate children inherit from the father the same as the legitimate children, when such illegitimate children have been generally and notoriously recognized by him as his own.

3. On the 10th of July, 1871, T. made a pre-emption settlement upon a quarter section of land in Reno county; he died before consum-ating his claim to the pre-emption. The administrator of his estate completed the pre-emption, and on the 20th of April, 1874, obtained a patent from the United States to the land. The patent granted unto the said heirs of T., deceased (the dead pre-emptor), and to their heirs the tract pre-empted. T. at the time of his death had living a legitimate child and also illegitimate children whom he had generally and notoriously recognized as his own.

Held, that the word "heirs" in the patent included the illegitimate children as well as the legitimate child.

59 JOHN CALDWELL *vs.* D. B. MILLER and L. B. MILLER. } No. 5159.

Error from Reno county.

Statement.

On the 30th day of June, 1885, John Caldwell brought his action to have his title established to and recover possession of the northeast quarter of section twelve, township twenty-three south, range six west, in Reno county.

On January 24th, 1887, the case was submitted to the court, a jury being waived.

The court was requested by both parties to find separately the facts and law.

After hearing all the testimony the court took the case under advisement until the 6th of April, 1887.

At that time the court made and filed the following findings of fact:

"First. That on January 1st, 1809, one Robert Titus, mentioned in plaintiff's petition, was lawfully married at Sudbury, in Rutland county, Vermont, to one Phœbe Thomas, and that in October, A. D. 1810, there was born as the issue of that marriage a son, Alden Wheeler Titus, who was the only issue of that marriage.

Second. That after the birth of said son, Alden Wheeler Titus, the said Robert Titus abandoned his said wife and son and went into the war of 1812 and never lived with them any more.

Third. That said Robert Titus went from said war to East Bloomfield, in Ontario county, in the State of New York, and on July 14th, A. D. 1818, without having been divorced from said Phœbe, married Miriam Lee, by whom he had five children thereafter born, viz., Benjamin, Ason, Betsey, a daughter; Rachel, a daughter; Delight, a daughter; Lois, a daughter.

Fourth. That said Robert Titus thereafter, about the year A. D. 1832, removed from Ontario county, New York, to Lenox, Macomb county, Michigan.

Fifth. That defendant Lois Miller is the wife of the defendant D.

B. Miller and is the youngest daughter of said Robert Titus and Miriam Lee.

Sixth. That said Robert Titus in the year A. D. 1850 came to live with said D. B. Miller and Lois Miller, his wife, and continued to live with them from that date until his death, in 1871.

Seventh. That said D. B. Miller and his wife, Lois, and said Robert Titus came to Reno county, Kansas, from Will county, in the State of Illinois, and settled there in the year A. D. 1871.

Eighth. That said Robert Titus, on July 10th, 1871, made a pre-emption settlement upon the land in controversy in this suit, viz., N. E. ¼ sec. 12, township 23, range 6 west, Reno county, Kansas, and thereafter, on September 8th, 1871, died, not having completed his pre-emption as required by act of Congress of March 3rd, 1843, sec. 2269, Revised Statutes U. S. of 1878.

Ninth. Said Robert Titus died intestate and utterly without any money or property whatever. Upon his death said D. B. Miller was by the probate court of Reno county, Kansas, appointed
60 administrator of said Robert Titus, deceased, and with his own money caused said pre-emption to be completed, paying the double minimum price for said land to the Government, viz., $400. This was done in the year 1871.

Tenth. That on the completing of said pre-emption by said D. B. Miller, as administrator, a patent for said land was issued by the United States under and in accordance with the section 2269, Revised Statutes U. S., a copy of which is hereunto annexed, marked Exhibit "A," and made a part of these findings.

Eleventh. That said Robert Titus died in Reno county, Kansas, intestate, on September 8th, 1871.

Twelfth. That said Miriam Lee died intestate in the year A. D. 1853.

Thirteenth. That his said wife, Pheobe Thomas Titus, died in Rutland county, Vermont, in the year A. D. 1860.

Fourteenth. That said Alden W. Titus, son of Robert and Phœbe Titus, died in Charlestown, Mass., in the year A. D. 1876, intestate, leaving heirs.

Sixteenth. That said defendant, D. B. Miller, has purchased from said heirs of Alden W. Titus and, under proper conveyances from them, is the owner of all the rights, title, and interest in said land which inured to the said Alden W. Titus' benefit as the heir of said Robert Titus under said patent.

Seventeenth. That plaintiff has conveyances from the following aforesaid named children of said Robert Titus and Miriam Lee, viz: Delight, intermarried with one Caldwell, the father of plaintiff, and Rachel, intermarried with Crandall, conveying to him whatever title they had in said land in controversy.

Eighteenth. That said Betsey, intermarried with Nathan Hicks, died, to wit, on the — day of —— and left her surviving and who are still living Nathan Hicks, her husband; her son, Volney Hicks; her daughter Melissa West, her daughter Ada Wade, and her daughter Arabel Snyder.

Nineteenth. That said plaintiff has procured and has from said

Volney, Melissa, Ada, Arabel deeds of conveyance conveying to him all their several interests in the land in controversy and from James and Joseph Miller.

Twentieth. Said D. B. Miller has procured from said Nathan Hicks and has a deed of conveyance conveying to him all the right, title, and interest which said Nathan Hicks had in said premises as the surviving husband of said daughter, Betsey.

Twenty-first. That said Benjamin Titus died in the year A. D. 1852 and left his widow, who is still living, and three daughters, two of whom are still living. The other daughter, Elmira, married Amos Miller and had seven children. Said Elmira died in the year A. D. 1885, leaving surviving her her said husband and the said seven children, all of whom are still living.

Twenty-third. That the said defendant, D. B. Miller, has proper conveyance of the land in controversy from said Amos Miller and from three of the said sons of Elmira, viz., William, ——, ——, conveying to him all the right, title, and interest in said land of which they were respectfully entitled to as heirs of said Benjamin Titus, deceased.

Twenty-fourth. That said children of Robert Titus and Miriam Lee were notoriously recognized by Robert Titus as his own and no question ever raised as to their legitimacy until in this suit.

Twenty-fifth. Plaintiff demanded to be let into possession
61 March 4th, 1885.

Twenty-sixth. If the Miriam Lee children of Robert Titus are heirs within the meaning of the act of Congress—sec. 2269, U. S. Revised Statutes, 1878—then the plaintiff is entitled to receive an undivided $\frac{1}{28}$ of the said land and damages for its detention since that time at the rate of $41.67 per year."

The said D. B. Miller claims all of the said land under the said act of Congress and under the said conveyances of said legitimate heirs of said Robert Titus to him, and if legitimate children only are heirs under said act of Congress, then said defendants are entitled to recover.

EXHIBIT "A."

Certificate No. 593.

"The United States of America to all to whom these presents shall come, Greeting:

Whereas D. B. Miller, administrator for the heirs of Robert Titus, deceased, of Reno county, Kansas, has deposited in the General Land Office of the United States a certificate of the register of the land office at Wichita, Kansas, whereby it appears that full payment has been made by the said D. B. Miller, administrator, according to the provisions of the act of Congress of the 24th day of April, 1820, entitled An act making further provisions for the sale of the public lands, for the northeast quarter of section twelve, township twenty-three, range six west, in the district of lands subject to sale at Wichita, Kansas, containing one hundred and sixty acres according to the official plat of the survey of the said lands returned to the Gen-

eral Land Office by the surveyor general, which said tract has been purchased by the said D. B. Miller, administrator:

Now know ye that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such cases made and provided, have given and granted and by these presents do give and grant unto the said heirs of Robert Titus, deceased, and to their heirs, the *above* tract above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature belonging, unto the said heirs of Robert Titus, deceased, and to their heirs and assigns forever.

In testimony whereof I, Ulysses S. Grant, President of the United States of America, have caused the letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the 20th day of April, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-eighth.

By the President:

U. S. GRANT,
By A. WILLIAMSON, *Secretary.*

Recorded in volume I, page 386.

[Seal General Land Office U. S.]

L. K. LIPPENCOTT,
Recorder of the General Land Office."

And thereon the court made the following conclusion of law:

"From the foregoing findings of fact the court finds for the
62 defendants; to all of which plaintiff excepts."

The court then rendered judgment for D. B. Miller, adjudging him the owner in fee simple of the northeast quarter of section twelve, township twenty-three south, range six, in Reno county, and entitled to the lawful possession of the same, and further rendered judgment that he and L. B. Miller were in the lawful possession of the property at the commencement of the action.

The plaintiff filed a motion for a new trial, which was overruled. He excepted and brings the case to this court.

63 JOHN CALDWELL
vs.
D. B. MILLER and L. B. MILLER. } No. 5159.

Error from Reno county. Reversed.

The opinion of the court was delivered by HORTON, *C. J.:*

On the 10th day of July, 1871, Robert Titus made a pre-emption settlement upon the land in controversy, being a quarter section of land in Reno county, in this State. He died before consum-ating his claim of pre-emption.

After his death D. B. Miller, administrator of his estate, filed the

necessary papers to complete the pre-emption, paying the price thereof, $400, from his own money to the United States.

On the 20th day of April, 1874, a patent to the land was issued by the United States.

The patent, among other things, recited that "the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such cases made and provided, have given and granted and by these presents do give and grant unto the said heirs of Robert Titus, deceased, and to their heirs the above tract described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said heirs of Robert Titus, deceased, and to their heirs and assigns forever."

Robert Titus, who made the pre-emption settlement, was married to Phœbe Thomas in Vermont in 1809. The only issue of this marriage was Alden W. Titus, born in October, 1810.

After the birth of his son, Robert Titus abandoned both his wife and child.

Without having a divorce, he had a marriage ceremony
64 preformed between him and Mir-am Lee, in the State of New York, on July 14th, 1818. By Miriam Lee he had five children. The youngest was the daughter Lois. Lois married D. B. Miller, one of the defendants. In 1871 D. B. Miller, his wife, and Robert Titus came to this State from Illinois and settled in Reno county. Soon after Titus pre-empted the land now claimed by Miller.

Miriam Lee died in 1853. Mrs. Phœbe T. Titus died in Vermont in 1860. Alden W. Titus, the son by Mrs. Phœbe T. Titus, died in 1876, intestate, leaving heirs.

D. B. Miller purchased from the heirs of Alden W. Titus, deceased, all their right and title to the land in dispute and claims the fee simple title thereof by conveyances from them as the only heirs of Robert Titus, deceased.

John Caldwell, the plaintiff, is a son of Delight, a daughter of Robert Titus by Miriam Lee, and claims a portion of the land from her and through conveyances from several of the children and heirs of the children of Miriam Lee by ——.

The pivotal question is the interpretation of section 2269 Revised Statutes of the U. S., 1878. This question is one which may ultimately be decided by the Supreme Court of the United States. Therefore the final decision does not rest with us.

The section reads: "Where a party entitled to claim the benefits of the pre-emption laws dies before consummating his claim by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party, or one of the heirs, to file the necessary papers to complete the same; but the entry in such cases shall be made
65 in favor of the heirs of the deceased pre-emptor and a patent thereon shall cause the title to inure to such heirs as if their names had been specially mentioned."

The plaintiff contends that the words "the heirs of the de-

ceased pre-emptor" include legitimate and illegitimate children if the illegitimate children were generally and notoriously recognized by Robert Titus in his lifetime as his own.

Under this rule the heirs of Alden W. Titus, deceased, and the children of Miriam Lee or their heirs are all heirs of Robert Titus, deceased. This would give John Caldwell an undivided thirteen twenty-eighths of the land and damages for its detention.

On the other hand, the defendants claim the word "heirs" must be determined by the common law of England. Therefore it is contended by them that the heirs of Alden W. Titus, deceased, had the sole right to the land prior to their conveyances to D. B. Miller. This would give all the land to Miller.

In interpreting the United States statutes the question is not what Congress has the power to do, but what Congress has actually done.

Congress has not defined the term "heirs."

The land is situate in this State. Robert Titus died in this State. Therefore, to determine who are meant by the words in the patent, "heirs of Robert Titus, deceased," we think we must look to the statutes of this State.

"It seems to us scarcely necessary to say that this is purely a question of statutory law." McKinney *vs.* Stewart, 5 Kas., 391. "An heir is one who by statute is capable of inheriting from another or one who succeeds to the estate of a deceased." McKinney *vs.* Stewart, *supra*; Delashmutt *vs.* Parrent, 40 Kas., 641.

In the act concerning descents and distributions are the following provisions, which are now in force and were also in
66 force at and before the death of Robert Titus:

"SECTION 22. Illegitimate children inherit from the mother and the mother from the children.

SECTION 23. They shall also inherit from the father when they have been recognized by him as his children, but such recognition must have been general and notorious or else in writing." Chap. 33, General Statutes, 1889, pages 780–787.

Under this statute, as the children of Miriam Lee were generally and notoriously recognized by Robert Titus as his own, they inherited from their father with Alden W. Titus, the legitimate child.

The conclusion of law of the district court in favor of the defendants is therefore erroneous.

That the statute of this State must determine who are "heirs" is in accord with the prior decisions of this court.

In Brown *vs.* Belmarde, 3 Kas., 41, the syllabus reads: "Prior to the treaty of June 3, 1825, with the Kansas Indians, they had the 'Indian title'—*i. e.*, a life interest in the usufruct of a body of land in eastern Kansas, including that in controversy—the United States holding the ultimate title, charged with this interest of the Indian nation so long as they should remain a nation. This 'Indian title' was by the sixth article of that treaty vested in certain individuals—that to the land in question in Lavonture.

From the death of Lavonture, in 1847 or '48, to the passage of

the act of Congress, May 26th, 1860, the whole title to the land in question was in the Government, and that act operated as an original grant to certain reserves and the 'heirs of deceased re-
67 serves' mentioned therein.

'Heirs of deceased reserves,' used therein, is *descriptio personæ*, and is to be construed with reference to and determined by the law at the time the estate passed, and whoever under the laws of this State would have inherited had Lavonture died May 26th, 1860 (the date of the approval of the act of Congress), are the persons to whose benefit the grant inured."

In Clark *vs.* Lord, 20 Kas., 390, it is said: "The patent was not issued to Eleanor Richardson, but to 'the heirs of Eliza Richardson,' and said Eleanor Richardson obtained her intenest, not as an allottee nor as a patentee, but by virtue of the laws of the State of Kansas, which authorized her, as an heir of Eliza Richardson, to inherit the estate of her sister. If Eliza had lived, the lands would have been allotted and patented to her. After her death they were patented to her heirs, without naming them, and the law of the State determined who these were. Eleanor simply inherited the lands granted to Eliza during her life, and the patent is evidence of the partition of the lands and the division made in pursuance of the treaty. The death of Eliza Richardson did not change the terms and conditions of the treaty nor annul the grant to her; but, as the patent could not issue to a dead person, it was necessarily issued to the heirs of Eliza, but such heirs were not controlled by the restrictions applicable to the allottees and patentees. If the patent had issued to Eliza in her lifetime, her death would have abrogated the restrictions on the alienation of the land, and, having issued after her decease, it placed the heirs in the same condition, as to their rights in the property, as if issued before."

68 See also Cutting *vs.* Cutting, 6 Sawyer, 396–406; Myers' Federal Decisions, vol. 21, pages 370, 371, 399; Lamb *vs.* Starr, 1 Deady, 358.

Defendants cite McCool *vs.* Smith, 1 Black, 459. We do not think that decision is authority for them.

"Next of kin" is construed in that case by the common-law definition for the reason that the common law of England was in force by express statute in the State of Illinois at the death of the party referred to in the opinion.

If we were required to go outside of the statutes of this State and to the common law of England to determine what is meant by the term "heirs," we would have insuperable difficulties to encounter. If we are not to construe "heirs" in this case by the statute of this State, it is impossible to determine, as Congress has not adopted the common law of England, what part or portion of the common law of that country is applicable.

Among the canons of descent, as enumerated by Blackstone, are two which are wholly inapplicable to this country and which could never have been within the intention of Congress to apply in this State or any other State of the Union.

One of these common-law canons is "that where there are two or

more males in equal degree, the eldest only shall inherit, but the females altogether. As if a man has two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies, Matthew, his eldest son, shall alone succeed to his estate, in exclusion of Gilbert, the second son, and both the daughters; but if both the sons die without issue before the father, the daughters, Margaret and Charlotte, shall both inherit the estate as coparceners."

69 The other canon is "that the male issue shall be admitted before the female. Thus, sons shall be admitted before daughters; or, as our male law-givers have somewhat uncomplaisantly expressed it, the worthiest of blood shall be perferred. As if John Stiles hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies—first, Matthew and (in case of his death without issue) then Gilbert shall be admitted to the succession in preference to both the daughters." 2 Bl. Com. (Wendell), pages 212, 213.

We do not think it necessary to comment upon the attempted removal of this case to the United States circuit court.

After the application for removal was denied by the district court the parties filed new pleadings and entered into various stipulations and wholly disregarded any attempted removal.

The judgment of the district court must be reversed and the cause remanded, with direction to the court below to enter judgment upon the findings of fact in favor of John Caldwell and against the defendants for the undivided $\frac{1}{2}\frac{3}{5}$ths of the land and damages for its detention from March 4th, 1885, at the rate of $41.67 per year.

70 And afterwards, on the 16th day of May, 1890, there was filed in the office of the clerk of said court a petition for a writ of error, which, with the allowance of the prayer thereof endorsed thereon by the Honorable Albert H. Horton, chief justice of the supreme court of the State of Kansas, is in the words and figures as follows, to wit:

71 In the Supreme Court of the State of Kansas.

JOHN CALDWELL, Plaintiff in Error,
vs.
D. B. MILLER and L. B. MILLER, Defendants in Error.

To the Honorable Albert H. Horton, chief justice of the said supreme court:

Your petitioners, the said defendants in error, desire that you allow them a writ of error in the said suit lately decided against them in said supreme court of the State of Kansas to the Supreme Court of the United States, and that a citation may issue to the said plaintiff in error signed by your hand.

As cause for issuing said writ of error your petitioners show you herein that the said suit in the court below was begun by said plaintiff in error against these defendants in error and others to recover title to the northeast quarter of sec. 12, township 23, range six, in

Reno county, State of Kansas; that said land was pre-empted by Robert Titus, who died before completing his right, by filing in due time all the papers essential to the establishment of the same, and same was completed by his administrator pursuant to requirements of sec. 2269 of the Revised Statutes of the United States, being section two of chapter 86 of act of Congress of March 3rd, 1843; that a patent was issued thereon to the heirs of Robert Titus, deceased; that said defendants in error claim title to all said land under conveyance from all the legitimate heirs of said Robert Titus, deceased; that plaintiff in error claims title to $\frac{1}{2}\frac{3}{8}$ of the same under conveyance from illegitimate children of Robert Titus, deceased; that said action was commenced in the district court of Reno county, Kansas, and a final judgment rendered there in favor of said defendants upon said issues upon a finding by said court of all the facts; that said John Caldwell, plaintiff in error, prosecuted his petition in error to the supreme court of said State of Kansas to reverse said judgment of the said district court of Reno county, wherein, on May 10, 1890, said supreme court rendered a final judgment in said case, reversing said judgment as to $\frac{1}{2}\frac{3}{8}$ of said land and adjudging that "the judgment of the district court of Reno county must be reversed and the case remanded, with direction to the court below to enter judgment upon the findings of fact in favor of John Caldwell and against the defendants for the undivided $\frac{1}{2}\frac{3}{8}$ of the land and damages for its detention from March 4, 1885, at the rate of $41.67 per year."

The defendants in error claimed that they are entitled to said land under a correct interpretation of said act of Congress, in that only legitimate children are intended in said act, and the record shows that such claim was specifically made by the pleadings and at the trial, and the said supreme court being the highest court of said State in which a decision in the suit could be had, and said decision being adverse to the right of your petitioners claimed therein, all of which will fully appear from the record in said
72 cause now on file in said supreme court of the State of Kansas.

Wherefore your petitioners pray for the allowance of a writ of error to the Supreme Court of the United States — for the signature of a citation to said plaintiff in error, John Caldwell; and your petitioners will ever pray.

VANDEVEER AND MARTIN, AND
ALMERIN GILLETTE,
Att'ys for D. B. and L. B. Miller.

Writ of error and citation allowed and surety for writ of error, to operate as supersedeas, fixed at $2,000.00. Dated this 14th day of May, A. D. 1890.

—— ——,
Chief Justice of Supreme Court of the State of Kansas.

5159. John Caldwell *vs.* D. B. Miller and L. B. Miller. Petition to Honorable A. H. Horton, chief justice of supreme court of Kansas, for a writ of error to Supreme Court of United States, for citation,

and fixing amount of security for supersedeas. Filed May 16, 1890. C. J. Brown, clerk supreme court.

In the Supreme Court of the State of Kansas.

JOHN CALDWELL, Plaintiff in Error,
vs.
D. B. MILLER & L. B. MILLER, Def'ts in Error.

Ordered this 14th day of May, 1890, that the prayer of the petition of said D. B. and L. B. Miller for allowance of writ of error to Supreme Court of United States and signature of citation be allowed, and that said writ of error operate as a supersedeas on filing with clerk of this supreme court of Kansas of a good bond in the sum of two thousand dollars, conditions as required by law, within ten days from rendition of judgment in said case.

ALBERT H. HORTON,
Chief Justice of Supreme Court of State of Kansas.

73 And afterward, on the 17th day of May, 1890, there was filed in the office of the clerk of said court an appeal bond in the above-entitled cause, which, with the approval thereof endorsed thereon, is in the words and figures as follows, to wit:

74 Know all men by these presents that we, D. B. Miller, L. B. Miller, E. L. Meyer, and W. E. Burnes, are held and firmly bound unto John Caldwell in the full sum of two thousand dollars, to be paid to the said John Caldwell, his attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of May, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a term of the supreme court of the State of Kansas, in a suit depending in said court between John Caldwell, plaintiff in error, and D. B. Miller and L. B. Miller, defendants in error, judgment was rendered against said D. B. Miller and L. B. Miller, and the said D. B. Miller and L. B. Miller having obtained a writ of error to the Supreme Court of the United States and filed a copy thereof in the clerk's office of said supreme court of Kansas to reverse the judgment in the aforesaid suit, and a citation directed to the said John Caldwell, citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said D. B. Miller and L. B. Miller shall prosecute their said writ of error to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and effect.

D. B. MILLER. [SEAL.]
L. B. MILLER. [SEAL.]
E. L. MEYER.
W. E. BURNS. [SEAL.]

Justification.

THE STATE OF KANSAS, } ss:
Reno County, }

E. L. Meyer and W. E. Burns, being each severally duly sworn, each upon his oath says that he is worth over two thousand dollars over and above all liabilities and exemptions.

E. L. MEYER.
W. E. BURNS.

Sworn to and subscribed before me this 16th day of May, A. D. 1890.

[SEAL.] CHAS. N. PAYNE,
Deputy Clerk District Court, Reno County, Kansas.

The above and foregoing bond and the sureties thereon approved by me this 22nd day of May, 1890.

ALBERT H. HORTON,
Chief Justice Supreme Court of Kansas.

No. 5159. Supreme court. Supersedeas bond. Vandeveer and Martin, attorneys for D. B. and L. B. Miller. Filed May 17, 1890. C. J. Brown, clerk supreme court.

75 And also, on the 17th day of May, 1890, there was filed in the office of the clerk of said court a writ of error in the above-entitled cause, the original of which is hereunto attached and is in the words and figures as follows, to wit:

76 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the supreme court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Kansas, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John Caldwell, plaintiff in error, and D. B. Miller and L. B. Miller, defendants in error, wherein was drawn in question the construction of a statute of the United States and the decision was against — title and right specially set up and claimed under such statute of the United States, a manifest error hath happened, to the great damage of the said D. B. Miller and L. B. Miller, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have

the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 16th day of May, in the year of our Lord one thousand eight hundred and ninety.

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862. }

GEO. P. SHARITT,
Clerk of the United States Circuit Court for the District of Kansas.

77 [Endorsed:] 5159. John Caldwell *vs.* D. B. Miller *et al.* Writ of error. Filed May 17, 1890. C. J. Brown, clerk sup. court.

The within and foregoing writ examined, approved, and allowed by me this 22d day of May, 1890.

ALBERT H. HORTON,
Chief Justice of the Supreme Court of the State of Kansas.

78 And afterwards, on the 22nd day of May, 1890, there was filed in the office of the clerk of said court the citation, which, with the proof of the service thereof on the opposing party, is in the words and figures as follows, to wit:

79 *Citation.*

The United States of America to John Caldwell, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, in a suit wherein D. B. Miller and L. B. Miller are plaintiffs in error and John Caldwell is defendant in error, to show cause, if any there be, why said judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in this behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 22nd day of May, in the year of our Lord one thousand eight hundred and ninety.

ALBERT H. HORTON,
Chief Justice of the Supreme Court of the State of Kansas.

THE STATE OF KANSAS, *Shawnee County,* } *ss:*

On the 22nd day of May, 1890, personally appeared G. A. Vandeveer, the subscriber, who, being by me first duly sworn, upon his

oath says that he delivered a true copy of the within citation to W. E. Brown, one of the attorneys of said defendant in error, John Caldwell.

G. A. VANDEVEER.

Sworn to and subscribed before me this 22nd day of May, A. D. 1890.

[Seal Supreme Court, State of Kansas.]

C. J. BROWN,
Clerk Supreme Court.

80 STATE OF KANSAS, } ss:
Shawnee County, }

I, W. E. Brown, one of the attorneys for John Caldwell, do hereby acknowledge due service of within and foregoing citation, and that a true copy of same was delivered to me personally at Topeka, Kas., this 22nd day of May, A. D. 1890.

W. E. BROWN,
Att'y for Caldwell.

[Endorsed:] 5159. No. —. Supreme court. —— ——, plaintiff, *vs.* —— ——, defendant. Filed May 10. 1890. C. J. Brown, clerk sup. c't. Almerin Gillett, Vandeveer & Martin, attorneys for D. B. & L. B. Miller.

81 In the Supreme Court of the United States, of October Term, in the Year of Our Lord One Thousand Eight Hundred and Ninety.

DANIEL B. MILLER and L. B. MILLER } In Error (from the Supreme
vs. } Court of the State of Kan-
JOHN CALDWELL. } sas).

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Daniel B. Miller and L. B. Miller, by their attorn*ies*, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit:

That the declaration aforesaid and matters therein contained are not sufficient in law for the said John Caldwell to have or maintain his aforesaid action thereof against the said Daniel B. Miller and L. B. Miller.

There is also error, in this, to wit:

That by the record aforesaid it appears that the judgement aforesaid given was given for the said John Caldwell against the said Daniel B. Miller and L. B. Miller, whereas by the law of the land the said judgement ought to have been given for the said Daniel B. Miller and L. B. Miller against the said John Caldwell.

There is also error, in this, to wit:

That on the trial and in the record aforesaid it appears that there was drawn in question the construction of a statute of the United

States, through and under which the said Daniel B. Miller and L. B. Miller claimed title to the land in controversy, and the decision was against the right and title claimed under by them.

And the said Daniel B. Miller and L. B. Miller pray that the judgement aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restorend to all things which they have lost by occasion of said judgement, etc.

B. P. WAGGENER,
Counsel for Plaintiff.

[Endorsed:] In the Supreme Court U. S. Daniel B. Miller and L. B. Miller *vs.* John Caldwell. Assignment of errors.

82 In the Supreme Court of the State of Kansas.

I, C. J. Brown, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, correct, and complete transcript of all pleadings and papers filed and of all proceedings had in the above-entitled cause in the said supreme court as the same remain on file and of record in my office.

Seal Supreme Court, State of Kansas.

Witness my hand and the seal of the supreme court of the State of Kansas affixed hereto, at my office, in the city of Topeka, this 15th day of August, 1890.

C. J. BROWN,
Clerk of the Supreme Court of the State of Kansas.

Endorsed on cover: Case No. 14,164. Kansas supreme court. No. 190. D. B. Miller and L. B. Miller, plaintiffs in error, *vs.* John Caldwell. Filed September 22, 1890.

Office Supreme Court U. S.
FILED.
OCT 30 1893
JAMES. H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

No. ~~14,184~~ 190

DANIEL B. MILLER AND LOIS B. MILLER, PLAINTIFFS IN ERROR,

vs.

JOHN CALDWELL, DEFENDANT IN ERROR.

MOTION TO REVIVE.

Now comes The Hutchinson Investment Company of Hutchinson, Kansas, and a corporation of said State, and suggests the death since the last term of this Court, to wit, on December 1, A. D. 1892, of the said plaintiff in error, D. B. Miller, and moves the Court that said cause be revived as to said D. B. Miller in its name as a plaintiff in error, and for cause thereof shows, by affidavit and certified copies of deeds hereto attached, that it is the successor in interest, under warranty deed from said D. B. Miller, to the title to the land in controversy in this suit, to wit, the northeast quarter of section No. 12, township 23, range 6 west, in Reno county Kansas; that said Hutchinson Investment Company append hereto as proofs thereof—

1st. The affidavit of Lois B. Miller.

2d. Certified copy of warranty deed from D. B. Miller and Lois B. Miller, his wife, of this land to Loretta Collins, dated July 17, 1885.

3d. Certified copy of warranty deed from Loretta Collins and husband to Hutchinson Investment Company of this land, dated September 4, 1885.

This action was begun June 30, A. D. 1885.

ALMERIN GILLETT,
Att'y and Counsellor for Hutchinson Investment Co.

STATE OF KANSAS, } ss.
Reno County, }

Before me, probate judge within and for said county and State, personally came Lois B. Miller, to me known to be the same person she represents herself to be, and, being by me first duly sworn, deposeth and saith that I am the widow of Daniel B. Miller, deceased; that said Daniel B. Miller, my late husband, died December 1, 1892, at our residence in Hutchinson, Kansas; that I was present at his death and funeral; that said Daniel B. Miller is the identical person who formerly owned the northeast quarter of section twelve (12), township twenty-three (23), range six (6) west, Reno county, Kansas; that he and myself conveyed said tract to Loretta Collins, and that said land was afterwards conveyed to the Hutchinson Investment Company; that said Daniel B. Miller is the identical person who is defendant in the suit now pending before the Supreme Court of the United States on appeal, in which John Caldwell was plaintiff in the lower courts.

The above statement of facts is made from personal knowledge; and further affiant saith not.

LOIS B. MILLER.

Subscribed and sworn to before me this 28th day of September, 1893.

[SEAL.]

J. A. FONPON,
Probate Judge.

Deed—General Warranty.

This indenture, made this 17th day of July, A. D. 1885, between Daniel B. Miller and Lois B. Miller, his wife, of Reno county, in the State of Kansas, of the first part, and Loretta Collins, of Reno county, in the State of Kansas, of the second part:

Witnesseth, that said parties of the first part, in consideration of the sum of eight thousand and $\frac{0}{100}$ dollars, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey unto said party of the second part, his heirs and assigns, all the following-described real estate, situated in the county of Reno and State of Kansas, to wit: The northeast quarter of section No. twelve (12), in township No. twenty-three (23), of range No. six (6) west, of the 6th P. M., containing one hundred and sixty acres, more or less, according to the U. S. survey.

To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, forever.

And said Daniel B. Miller and Lois B. Miller, for themselves, their heirs, executors or administrators, do hereby covenant, promise and agree to and with said party of the second part, that at the delivery of these presents they are lawfully seized, in their own right, of an absolute and indefeasible estate of inheritance, in fee simple, of and in all and singular the above granted and described premises, with the appurtenances; that the same are free, clear, discharged and unincumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances, of what nature or kind soever; and that they will warrant and forever defend the same unto said party of the second part, her heirs and assigns, against said parties of the first part, their heirs, and all and every person or persons whomsoever, lawfully claiming or to claim the same.

In witness whereof, the said parties of the first part have hereunto set their hands, the day and year first above written.

D. B. MILLER.
LOIS B. MILLER.

[Endorsed:] Deed—general warranty—from D. B. Miller *et ux.* to Loretta Collins. Entered in transfer record in my office this — day of —, A. D. 189-. —— ——, county clerk. State of Kansas, Reno county, *ss:* This instrument was filed for record on the 1st day of August, A. D. 1885, at 4 o'clock p. m., and duly recorded in Book 15, on page 553. Fee, $—. J. S. May, register of deeds.

STATE OF KANSAS, } *ss:*
Reno County, }

Be it remembered that on this 17th day of July, A. D. 1885, before me, the undersigned, a notary public in and for the county and State aforesaid, came Daniel B. Miller and Lois B. Miller, his wife, who are personally known to me to be the same persons who executed the within instrument of writing, and such persons duly acknowledged the execution of the same.

In testimony whereof I have hereunto set my hand and affixed my official seal the day and year last above written.

[SEAL.] A. R. SCHEBLE,
Notary Public.

Term expires Oct. 3, 1887.

STATE OF KANSAS, } *ss:*
Reno County, }

I, H. C. Barrett, register of deeds within and for said county, do hereby certify the within and foregoing to be a full, true, and complete copy of the record of the within instrument as appears from the record now in my office.

Witness my name and official seal this 28th day of September, 1893.

[SEAL.] H. C. BARRETT,
Register of Deeds,
By W. D. TAYLOR, *Dept.*

Deed—General Warranty.

This indenture, made this 4th day of September, A. D. 1885, between Loretta Collins and Charles Collins, her husband, of Reno county, in the State of Kansas, of the first part, and Hutchinson Investment Company of Reno county, in the State of Kansas, of the second part:

Witnesseth, that said parties of the first part, in consideration of the sum of thirty two-thousand and no hundreths dollars, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey, unto said party of the second part, its heirs and assigns, all the following-described real estate, situated in the county of Reno and State of Kansas, to wit: The north half (½) of section twelve (12), in township twenty-three south, in range six (6) west, of the sixth principal meridian, containing three hundred twenty acres, be the same more or less, according to U. S. survey thereof N. ½ 12, 23, 6.

To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, forever.

And said grantors, for themselves, heirs, executors or administrators, do hereby covenant, promise and agree, to and with said party of the second part, that at the delivery of these presents they are lawfully seized, in their own right, of an absolute and indefeasible estate of inheritance, in fee simple, of and in all and singular the above granted and described premises, with the appurtenances; that the same are free, clear, discharged and unincumbered of and from all former and other grants, titles, charges, estates,

judgments, taxes, assessments and incumbrances, of what nature or kind soever; and that they will warrant and forever defend the same unto said party of the second part, its heirs and assigns, against said parties of the first part, their heirs, and all and every person or persons whomsoever, lawfully claiming or to claim the same.

In witness whereof, the said parties of the first part have hereunto set their hands, the day and year first above written.

LORETTA COLLINS.
CHARLES COLLINS.

[Endorsed:] Deed—general warranty—from Loretta Collins *et ux.* to Hutch. Im. Co. Entered in transfer record in my office this — day of —, A. D. 189–. ——, county clerk. State of Kansas, Reno county, *ss:* This instrument was filed for record on the 11th day of Sep., A. D. 1885, at 10 o'clock a. m., and duly recorded in Book 15, on page 589. Fee, $—. J. S. May, register of deeds.

STATE OF KANSAS, }
Reno County, } *ss:*

Be it remembered that on this 4th day of September, A. D. 1885, before me, the undersigned, a notary public in and for the county and State aforesaid, came Loretta Collins and Charles Collins, her husband, who are personally known to me to be the same persons who executed the within instrument of writing, and such persons duly acknowledged the execution of the same.

In testimony whereof I have hereunto set my hand and affixed my notarial seal the day and year last above written.

[SEAL.] A. J. HUNTER,
Notary Public.

Term expires Aug. 15, 1888.

STATE OF KANSAS, } ss:
Reno County, }

I, H. C. Barrett, register of deeds within and for said county, do hereby certify the within and foregoing to be a full, true, and complete copy of the record of the within instrument as appears from the record now in my office.

Witness my name and official seal this 28th day of September, 1893.

[SEAL.]

H. C. BARRETT,
Register of Deeds.
By W. D. TAYLOR, *Dept.*

[Endorsed:] Case No. 14,164. Supreme Court U. S., October term, 1893. Term No., 190. D. B. Miller *et al.*, pl'ffs in error, *vs.* John Caldwell. Suggestion of death of D. B. Miller and motion to revive cause in the name of The Hutchinson Investment Co. Filed Oct. 30, 1893.

Office Supreme Court U. S.
FILED.
NOV 6 1893
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

General No. 14,164.

October Term, 1893. Term No., 190.

D. B. MILLER and L. B. MILLER,
Plaintiffs in Error,
vs.
JOHN CALDWELL,
Defendant in Error.

In Error to the Supreme Court of the State of Kansas.

BRIEF AND ARGUMENT OF ALMERIN GILLETT, ESQ.,
FOR PLAINTIFFS IN ERROR.

In the Supreme Court of the United States.

General No. 14,164.

D. B. MILLER and L. B. MILLER,
Plaintiffs in Error,
vs.
JOHN CALDWELL,
Defendant in Error.

October Term, 1893.

Term No., 190.

In Error to the Supreme Court of the State of Kansas.

BRIEF AND ARGUMENT OF ALMERIN GILLETT, ESQ., FOR PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

This is an action commenced in the District Court of Reno County, in the State of Kansas, by John Caldwell as plaintiff, against D. B. Miller, Lois B. Miller, his wife, and various other parties, by filing a petition in said Court, on June 30th, A. D. 1885. Service was had upon all the defendants. The petition is in three causes of action, and was treated at the trial as an ordinary petition for the recovery of the undivided three-fifths of the north-east quarter of Section twelve, Township twenty-three, Range six, west, in Reno County, Kansas, and damages for its detention. The petition begins at page 5, and with its exhibits extends to page 21 of record. Defense was made by defendants D. B. Miller and L. B. Miller for whole tract. The other defendants did not appear. After certain demurrer, answer, amended answer, etc. had been filed, the defendant D. B. Miller, on January 6th, 1887, filed by leave of Court, his supplemental answer, page 35 of record, among other matters, setting up a federal question, and claiming title to the land under the true construction of an act of Congress. The supplemental answer, after the title of the case, is in words and figures following, to-wit:

"Now comes the said defendant D. B. Miller, and for his supplemental answer, alleges that he makes by reference, both his former answer and his amended answer a part of this supplemental answer as fully as if copied herein; and further, by way of supplemental answer, says, that the said land in controversy was entered as a pre-emption by Robert Titus, in the year 1871, in the United States Land Office; that Robert Titus died in the same year, prior to consummating his said entry, and that defendant as administrator paid the money from his own funds to perfect said entry—amount, $400, cash—and was to large cost and expense in addition thereto; that the said estate was utterly insolvent, and had no money with which to pay the same; and the defendant has never been paid any part thereof; that said entry was consummated, and patent was issued, in the name of the heirs of Robert Titus, in accordance with the provision of Section 5269, Revised Statutes U. S. of A. D. 1878, which section is in words following, to-wit: "Where a party entitled to claim the benefit of the pre-emption laws dies before consummating his claim, by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party, or any one of the heirs to file the necessary papers to complete the same; that such entry in such cases shall be made in favor of the heirs of the deceased pre-emptor and the patent thereon shall cause the title to inure to such heirs, as if their names had been specially mentioned." That the sole and only heir of Robert Titus, within the true intent and meaning of said act of Congress, was Alden Wheeler Titus, who died in 1876, intestate, at Charlestown, Mass.; that since the last term of this Court this defendant has procured conveyances from all the heirs of said Alden W. Titus, deceased, and is thereby, as against this plaintiff, the owner of the said land under said act of Congress. Wherefore he prays that plaintiff's said action be dismissed at his costs.

Issue was joined on this answer by plaintiff, by demurrer which was overruled, and a reply was filed denying all the allegations of said supplemental answer. On these issues the case came on for trial on January 24th, 1887, before the Court, a jury being waived, and the case was taken under advisement until April 6th, 1887, when the Court made separate findings of fact and law, and rendered judgment thereon for defendants D. B. and L. B. Miller. The findings and judgment are found on page 38 of record and after the title, are in words and figures following, to-wit:

"Now, on this 24th day of January, 1887, at the————Term of this Court, appeared the plaintiff, John Caldwell, in person, and by Whiteside & Hutchinson, his attorneys, and said defendants D. B. and L. B. Miller, by Vandeveer and Martin and Almerin Gillett, their attor-

neys, the other defendants failing to appear, after having been duly served with notice in this case; and, this case coming on regularly for trial, a jury is by agreement of parties waived, and the trial submitted to the Court; and the Court having heard the evidence of the parties and argument of counsel, after being requested by both parties to find separately the facts and law, takes the case under advisement until the 6th day of April, of this term of this Court."

And now, to-wit, on this 6th day of April, the said parties appeared as before, and the Court, upon due consideration, filed his findings of facts and law separately in words and figures following, to-wit:

JOHN CALDWELL, *Plaintiff*,
vs.
D. B. MILLER, et al, *Def'ts*.

This Court finds as the facts in this case:

1st. That on January 1st, 1809, one Robert Titus, mentioned in plaintiff's petition, was lawfully married, at Sudbury, in Rutland county, Vermont, to one Phoebe Thomas, and that in October, A. D. 1810, there was born as the issue of that marriage a son, Alden Wheeler Titus, who was the only issue of that marriage.

2nd. That after the birth of said son, Alden Wheeler Titus, the said Robert Ttius abandoned his said wife and son, and went into the war of 1812, and never lived with them any more.

3rd. That said Robert Titus went from said war to East Bloomfield, in Ontario county, in the state of New York, and on July 14th, A. D. 1818, without having been divorced from said Phoebe married Miriam Lee, by whom he had five children thereafter born, viz: Benj. a son; Betsy, a daughter; Rachel, a daughter; Delight, a daughter; Lois, a daughter.

4th. That said Robert Titus thereafter, about the year A. D. 1832, removed from Ontario county, New York, to Lenox, Macomb county, Michigan.

5th. That said defendant, Lois Miller, is the wife of defendant D. B. Miller, and is the youngest daughter of said Robert Titus and Miriam Lee.

6th. That said Robert Titus in the year 1850, came to live with said B. D. Miller and Lois Miller, his wife, and continued to live with them from that date until his death in 1871.

7th. That said D. B. Miller and wife Lois and said Robert Titus came to Reno county, Kansas, from Will county, in the State of Illinois, and settled there in the year A. D. 1871.

8th. That said Robert Titus on July 10th, 1871, made a pre-emption settlement upon the land in controversy in this suit, viz: N. E. ¼ Sec. 12, twp. 23, R. 6 west, Reno county, Kansas, and thereafter, on

September 8th, 1871, died, not having completed his pre-emption as required by act of Congress (March 3rd, 1843, Sec. 2269, Revised Statutes U. S. 1878.)

9th. Said Robert Titus died intestate, and utterly without any money or property whatever. Upon his death said D. B. Miller was by the Probate Court of Reno county, Kansas, appointed administrator of said Robert Titus, deceased, and with his own money caused said pre-emption to be completed, paying the double minimum price for said land to the Government, viz: $400.00. This was done in the year 1871.

10th. That on the completing of said pre-emption, by said D. B. Miller as administrator, a patent for said land was issued by the United States under and in accordance with Section 2269, Revised Statutes U. S., a copy of which is hereunto annexed, marked Exhibit "A," and made a part of these findings.

11th. That said Robert Titus died in Reno county, Kansas, intestate, on September 8th, 1871.

12th. That said Miriam Lee died intestate in the year A. D. 1853.

13th. That his said wife, Phoebe Thomas Titus died in Rutland county, Vermont, in the year A. D. 1860.

14th. That said Alden W. Titus, son of said Robert and Phoebe Titus, died in Charlestown, Mass., in the year A. D. 1876, intestate leaving heirs.

16th. That said defendant, D. B. Miller, has purchased from said heirs of Alden W. Titus and, under proper conveyances from them, is the owner of all the rights, title, and interest in said land, which inured to the said Alden W. Titus's benefit as the heir of said Robert Titus under said patent.

17th. That plaintiff has conveyances from the following aforesaid named children of said Robert Titus and Miriam Lee, viz: Delight, intermarried with Caldwell, and Rachel, intermarried with Crandall, conveying to him whatever title they had in said land in controversy.

18th. That said Betsy intermarried with Nathan Hicks, died to-wit, on the ———day of————————, ———, and left her surviving and who are still living, Nathan Hicks, her husband; her son, Volney Hicks; her daughter Melissa West, her daughter Ada Wade, and her daughter Arabel Snyder.

19th. That said plaintiff has procured and has from said Volney, Melissa, Ada, Arabel, deeds of conveyance conveying to him all their several interests in the land in controversy and from James and Joseph Miller.

20th. Said D. B. Miller has procured from Nathan Hicks and has a deed of conveyance conveying to him all the right, title, and interest

which said Nathan Hicks had in said premises as the surviving husband of said daughter Betsy.

21st. That said Benjamin Titus died in the year A. D. 1852, and left his widow, who is still living, and three daughters, two of whom are still living; the other daughter Elmira, married Amos Miller and had seven children; said Elmira died in the year A. D. 1885, leaving surviving her, her said husband and the said seven children, all of whom are still living.

23rd. That the said defendant D. B. Miller has proper conveyance of the land in controversy from said Amos Miller and from three of the said sons of Elmira, viz: William conveying to him all the right, title and interest in said land, if any, which they were respectively entitled to as heirs of said Benjamin Titus, deceased.

24th. That said children of Robert Titus and Miriam Lee were notoriously recognized by Robert Titus as his own, and no question ever raised as to their legitimacy until in this suit.

25th. Plaintiff demanded to be let into possession March 4th, 1885.

26th. If the Miriam Lee children of Robert Titus are heirs, within the meaning of the act of Congress, Section 2269 U. S. Revised Statutes 1878, then the plaintiff is entitled to recover an undivided 13–28 of the said land and damages for its detention since that time at the rate of 41.67 per year.

The said D. B. Miller claims all of the said land under the act of Congress, and under said conveyances of said legitimate heirs of said Robert Titus to him, and if legitimate children only, are the heirs under said act of Congress, then said defendants are entitled to recover.

L. Houk, Judge.

As conclusions of law from the foregoing findings of fact, the Court finds for the defendants; to all of which plaintiff excepts.

L. Houk, Judge.

It is thereupon by the Court considered, ordered, and adjudged that the said defendant D. B. Miller is the owner in fee simple absolute of all the land described in said plaintiff's petition, to-wit: The Northeast quarter of section number twelve (12), township number twenty-three (23) South, range number six (6) West, in the county of Reno and State of Kansas, and lawfully in possession of the same, and that said defendants, D. B. Miller and L. B. Miller, were at the commencement of this suit and are still in lawful possession of same; that said defendants D. B. Miller and L. B. Miller, go hence without day, and recover of and from the said plaintiff their costs herein, taxed at the sum of———— Dollars, and hereof let execution issue; to all of which plaintiff duly excepted.

L. Houk, Judge.

EXHIBIT "A" TO 10TH FINDING.

Cetificate No. 593.

The United States of America to all whom these presents shall come, greeting:

Whereas D. B. Miller, administrator, for the heirs of Robert Titus, deceased, of Reno county, Kansas, has deposited in the General Land Office of the United States, a certificate of the Register of the Land office at Wichita, Kansas, whereby it appears that full payment has been made by the said D. B. Miller, administrator, according to the provisions of the act of Congress of the 24th day of April, 1820, entitled an act making further provision for the sale of the public lands, for the Northeast quarter of section twelve, township twenty-three, range six West, in the district of lands subject to sale at Wichita, Kansas, containing one-hundred and sixty acres according to the official plat of the survey of the said lands returned to the General Land Office by the Surveyor General, which said tract has been purchased by the Said D. B. Miller, administrator.

Now know ye that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such cases made and provided, have given and granted and by these presents do give and grant, unto the said heirs of Robert Titus, deceased, and to their heirs the said tract above described; to have and to hold the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said heirs of Robert Titus, deceased, and to their heirs and assigns forever.

In testimony whereof I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the 20th day of April, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-eighth.

By the President:

U. S. GRANT,
By A. WILLIAMSON, Secretary.

Record in volume 1, page 386.
(Seal General Land Office U. S.)

L. K. LIPPENCOTT,
Recorder of the General Land Office.

Copy of patent referred to in and made part of findings as Exhibit "A."

L. HOUK.

Filed April 6th, 1887.

JNO. B. VINCENT, Clerk.

On April 3rd, 1888, the case was taken by petition in error to the Supreme Court of the State of Kansas for review. The petition in error will be found at page 1 of record. The case was decided May 10th, 1890, pages 43 and 44 of record. The judgment of the Supreme Court is on page 44 of record and is, omitting title, in words and figures following, to-wit:

"And afterwards, on the 10th day of May, 1890, the same being one of the regular judicial days of the January term, A. D. 1890, of the Supreme Court of the State of Kansas, before said Court, in session at the Supreme Court room in the city of Topeka—present, Honorable Albert H. Horton, chief justice; Honorable Daniel M. Valentine and Honorable William Johnson, associate justices and C. J. Brown, clerk of said Court—The following proceedings among others, were had and entered of record as follows, to-wit:

JOHN CALDWELL, *Plaintiff in Error*,
vs.
D. B. MILLER and L. R. MILLER, *Defendants in Error*.

This cause comes on for decision and thereupon it is ordered and adjuged that the judgment of the Court below be reversed, and that the cause be remanded with the direction to the Court below to enter judgment upon the findings of fact in favor of John Caldwell and against the defendants for the undivided thirteen-twenty-eights of the land and damages for its detention from March 4th, 1885, at the rate of $41.67 per year. It is further ordered that the defendants in error pay the costs of this case in this Court, taxed at ——— ——— dollars, and hereof let execution issue."

This judgment modifies the judgment of the Court below by giving plaintiff 13–28 of the land and damages for its detention at the rate of $41.67 per year from March 4th, 1885.

The opinion of the Supreme Court follows pages 44 to 52 of record.

By the pleadings and facts found a federal question is presented, the defendant Miller claiming title to all the land under conveyances from the heirs of Alden Wheeler Titus (as per finding 16) who was the only legitimate child and heir of said Robert Titus.

See 1st finding. (The other children were all illegitimate.)

The contention of the plaintiffs in error Miller's, was and is, that under the act of Congress Sec. 2269, Revised Statutes U. S. of 1878, the word heirs means legitimate children, and that illegitimate children are not heirs within the true intent and meaning of this act of Congress.

The contention of Caldwell is that the term heirs is to be construed by the Statute of descents of Kansas. The sections of it, claimed by de-

fendant in error to be applicable, and to govern this case, are the 22nd and 23rd, which are in words following to-wit:

"Sec. 22. Illegitimate children inherit from the mother and the mother from the children.

Sec. 23. They shall also inherit from the father, when they have been recognized by him as his children, but such recognition must have been general and notorious, or else in writing." Chap. 33, Gen. Stat. of Kan., 1889, pages 780–787.

If the contention of the Miller's, plaintiffs in error, is sound, they are entitled to a reversal of the judgment of the Supreme Court of Kansas, and an affirmance of the judgment of the trial Court. If the contention of Caldwell be sound, he is entitled to an affirmance of the judgment of the Supreme Court of Kansas.

II.

STATEMENT OF ERROR RELIED ON.

On page 1 of record and again on page 57 the assignment of errors states in substance:

"That the declaration aforesaid and matters therein contained are not sufficient in law for said John Caldwell to have or maintain his aforesaid action thereof against said D. B. Miller and L. B. Miller.

There is also error in this, to-wit:

That by the record aforesaid it appears that the judgment aforesaid given was given for said John Caldwell against the said Daniel B. Miller and L. B. Miller, whereas by the law of the land the said judgment ought to have been given for said Daniel B. Miller and L. B. Miller against the said John Caldwell.

There is also error in this, to-wit:

That on the trial and in the record aforesaid, it appears that there was drawn in question the construction of a Statute of the United States, through and under which the said Daniel B. Miller and L. B. Miller claim title to the land in controversy, and the decision was against the right and title claimed under, by them."

That plaintiff in error, D. B. Miller, set up and claimed title to all the land, by conveyances from the heirs of Alden W. Titus, who is alleged to be the sole and only heir of Robert Titus, within the meaning of this act of Congress, which is fully set out in said supplemental answer filed January 6th, 1887, on pages 35 and 36 of record. That this claim was urged in trial Court will be see from the 26th and last finding of fact of the trial Court at page 40 of record.

On May 10th, 1890, the Supreme Court of Kansas entered a judg-

ment, page 44 of record, reversing the judgment of the trial Court and giving judgment in favor of Caldwell for 13–28 of the land and damages for its detention.

To reverse which judgment of said Supreme Court the record of that Court is brought here for review upon a writ of error upon the federal question under Sec. 709 U. S. Revised Statutes 1878, being 25th Sec. of old judiciary act of 1789.

ARGUMENT.

The opinion was delivered by Hon. A. H. Horton, Chief Justice of the Supreme Court of Kansas, who, after stating very fairly the contention between plaintiffs in error, and defendant in error, says record, page 50:

"In interpreting the U. S. Statutes the question is *not* what Congress has the power to do, but what Congress has actually done." "Congress has not defined the word heirs," to all of which we cheerfully assent.

He then proceeds thus:

"The land is situate in this State (Kansas.) Robert Titus died in this State. Therefore to determine who are meant by the words in the patent "heirs of Robert Titus, deceased," we think we must look to the Statutes of this State (Kansas)." Then follows a citation of several Kansas decisions defining the term heirs under the Kansas Statute of descents.

We do not think these definitions of the term heirs under the Kansas Statute of descents are at all controlling, when we come to seek the true meaning of the word *heirs* in this act of Congress. As the Court well remarked, "the question is not what Congress has the power to do, but what Congress has actually done." The Hon. C. J. says, page 51 of record, "Defendants cite McCool vs. Smith, 1 Black 459. We do not think the decision is authority for them. "Next of kin" is construed in that case, by the common law definition, for the reason that the common law of England was in force by express Statute in the State of Illinois, at the death of the party referred to in the opinion."

We do not assent to this. McCool vs. Smith was cited as a statement by this Court, of a rule of construction of words having a common law meaning, like the word heirs, as used in this act of Congress. This Court says at page 469: "It is a sound rule, that whenever our Legislature use a term without defining it, which is well known in the English law, and there has been a definite, appropriate meaning affixed

to it, they must be supposed to use it in the sense in which it is understood in the English law."

After stating that the common law of England was adopted by the Legislature of Illinois on February 4th, 1819, and that it has been in force ever since, this Court says further: "By the rules of the common law, terms of kindred when used in a statute, include only those who are legitimate, unless a different intention is clearly manifested. This is conceded by counsel for defendant in error. The proposition is too clear to require either argument or authority to sustain it." We think in this case (McCool vs. Smith) the decision must necessarily have been the same if the common law of England had not been by express statute adopted in Illinois. Illinois was an English settled State, the same as Kansas and all the northern, western, eastern and middle states; and terms having a definite meaning at common law, used in any law of Congress, or any of these states, when not defined or otherwise limited, must perforce be understood in their common law sense. They can have no other appropriate meaning. So the rule stated is not based upon the fact that the common law had been adopted in Illinois, but because the rule is a sound one and universally applicable except in the civil law states.

From this point in the opinion, page 51 of record, we think the learned Chief Justice confuses the common law definition of heirs with the statute or *canons* of descent of England. See opinion citing Wendells Blackstone vol. 2, pages 212 and 213.

With the English *canons* of descent we have nothing to do. This act of Congress entirely takes the place of any English or any other *canons* of descent as it provides expressly: "Such entry * * * shall be made in favor of the *heirs* of the deceased pre-emptor and a patent thereon shall cause the title to inure to such *heirs* as if their names had been specially mentioned."

Once determined who are the heirs (and we look to the common law of England to determine that) and the act of Congress is the canon of descent so to speak. It is a direct grant by the Government to all the heirs equally. They all take as though their names had been specially mentioned in the patent. This we will assume is as tenants in common, each owning an undivided equal portion.

The crucial question in this case is the interpretation of Section 2269 Revised Statutes U. S. 1878. Plaintiffs in error hold conveyances to this land from all the legitimate heirs of Robert Titus. The patent issued under this section, caused the title to the land to inure to the *heirs* of the deceased pre-emptor as if their names had been specially mentioned. The patent does not name them, but is issued following the language of the act of Congress to "*the heirs of Robert Titus, deceased.*" The defendant

in error claims that the term heirs as there used is to be construed according to the statute of descents of Kansas.

Robert Titus had recognized these illegitimate children notoriously as per Section 23, State Statutes of Descent, and if he had died seized of this property, the plaintiff would be entitled under the laws of Kansas to an undivided 13-28 of the land. But title to this land is not derived under the laws of Kansas, it is derived under an act of Congress. The *term heirs*, is used by Congress to designate the beneficiaries of *its* grant.

The defendant in error says that as Congress has nowhere defined what is meant by the term heirs, therefore, it must be construed to mean heirs as designated by the laws of the various states and territories wherein the question of its meaning may arise. We say this conclusion is not sound. That such is not, and never has been, the rule of construction adopted in this country.

It is elementary as a rule of construction, that where a term which has a well defined signification at common law, is used in a statute, and there is nothing in the statute plainly showing a different intent, such term is presumed to have been used in its common law sense.

Story Coust. S. 158.
Potter's Dwarris, 185.
1 Kent, Com. Marg. p. 464.
Charles River Bridge vs. Warren Bridge, 11 Peters 545.
McCool vs. Smith, 1 Black U. S. Sup. Ct. 459.
Rice vs. R. R. Co, 1 Black U. S. Sup. Ct. 358-374.

Potter's Dwarris, p. 186:

"If a statute make use of a word the meaning of which is well known, and has certain definite sense at the common law, the word shall be expounded and received in the same sense in which it is understood at the common law."—citing 6, modern 143.

1 Kent, Com. Marg. p. 464.

"Statutes are likewise to be construed with reference to the principles of the common law."

McCool vs. Smith, 1 Black pp. 469-470-cited anti p. 9

In Charles River Bridge vs. Warren Bridge, 11 Peters p. 545 this Court say:

"Borrowing, as we have done, our system of jurisprudence from the Engligh law; *and having adopted, in every other case, civil and criminal, its rule for the construction of statutes*, is there anything in our local situation, or in the nature of our political institutions, which should

lead us to depart from the principle, when corporations are concerned? * * * * Can any good reason be assigned for excepting this class of cases (corporations) from the operation of the general principles, and for introducing a new and adverse rule of construction in favor of corporations, while we adopt and adhere to the rules of construction known to the English common law, in every other case, without exception? We think not."

In Rice vs. R. R. Co, 1 Black p. 374, this Court in discussing the effect of the grant of lands to the N. W. and Minn. R. R. Co. says:

"Grants made by a legislature are not warranties; and the rule universally applied in determining their effect is, that if the thing granted was not in the grantor at the time of the grant, no estate passes to the grantee. Even the defendants admit that *such was the rule at common law;* but they contend that the rule is not applicable to this case. * *

One of the reasons assigned is that there is no common law of the United States, and consequently, the rule just mentioned is inapplicable to cases of this description. Jurisdiction in common law cases can never be exercised by the Federal Courts unless conferred by an act of Congress, because such courts are courts of special jurisdiction, and derive all their powers from the constitution, and the laws of Congress passed in pursuance thereof. Rules of decision, also, in cases within the 34th Sec. of the Judicary Act, are derived from the laws of the States; *but in the construction of the laws of Congress the rules of the common law furnish the true guide;* and the same remark applies in the construction of the statutes of a state, except in cases where the courts of the state have otherwise determined."

We think these authorities sustain the rule of construction we contend for.

At common law an illegitimate child could not be an heir.

2 Bovier Inst. p. 355, par. 1956 and 1957.
Brooms Legal Maxims Marg. p. 457.
4 Bacon Abridgement p. 608, title Heir and Ancestor R. 2.
Cokes Littleton 7, b. 8 a.

Coke says: "Heirs in the legal understanding of common law, implyeth that he is in *lawful nuptials procreated*, for a legitimate heir is whom the marriage demonstrates, and is he to whom lands, tenements or hereditaments by the act of God and right of blood do descend of some estate of inheritance, * * * *a bastard can not be heir.*"

Our contention is that the term heirs as there used does not include illegitimate children. It includes only those in lawful nuptials procreated. All the right, if any, which defendant in error has, is derived by conveyances from illegitimate children of Robert Titus. The plaintiff in error, D. B. Miller, holds by purchase and proper convey-

ances from the legitimate and only legitimate heirs of Robert Titus, viz: Alden Wheeler Titus—See 16th finding.

So if legitimate children are meant by the term heirs in said act of Congress the plaintiff in error, D. B. Miller, has the whole title to the land.

This statute is not to be construed by the state laws, and is in no wise dependent upon them for its construction. It is to be construed in the light of the *common law*. This patent is a grant direct from the U. S. to a certain, fixed and well defined class of beneficiaries, which Congress had in mind at the time of the passage of the act. The same persons took then as take now, and the same persons take in one state as in another, and the class of beneficiaries does not change by the crossing of state lines. Else have we not the anomaly that an act of Congress is modified, amended or repealed by a state law? And have we not the still more striking anomaly that an act of Congress has no meaning until one is affixed to it by an act of a State legislature?

If we must in the language of the Kansas Supreme Court look to the State law to determine who are heirs, can anybody take if the state fails to define them? and must not this act of Congress fail in that event?

It seems to us that a contention which leads to such results cannot be sound.

Did Congress contemplate such a condition of things, and did they intend the act to receive such a construction?

Is not our contention more in line with what Congress intended?

We think the term heirs as there used is fixed and certain and is used in its common law sense. It does not comport with the dignity of Congress to give the construction claimed by the other side. It assumes that Congress has not in a clear grant named a specific beneficiary.

The contention interferes with the primary disposal of the soil, which the state has solemnly pledged itself not to do, *1st Clause State Const., Clause 5 Sec. 3 act of admission; act Kansas Leg. accepting same.*

The title never was in Robert Titus. The State Statute of descents in terms only attempts to act upon property of which the deceased died seized. He had acquired no interest in the land, but only a right to acquire an interest, which right was lost by his death.

The inchoate right of Robert Titus at his death lapsed to the U. S. and the U. S. grant this lapsed right to their own beneficiaries, not the states.

The construction claimed by plaintiffs puts Congress in the attitude of having made by this act, a grant of a floating right, a right which could only become certain when the state law designates the beneficiary.

There were, when this case was tried, some thirty-eight states and

ten territories, within the jurisdiction of this act of Congress, besides Alaska and the District of Columbia, every one of which, if counsels contention is correct has the right to fix a different meaning to this act of Congress. This is a federal question and under Section 709 U. S. Revised Statutes, 25th Section of the old Judiciary act 1789 goes properly to the Supreme Court U. S. for final interpretation.

But the claim we make is consistent, logical and sound. It gives dignity and certainty to the grant, it gives Congress the credit (which should be accorded to all givers) of naming its own donee, and not of making a floating grant with the right in another government to name the beneficiary, or change him, as it may like.

We think no federal court has ever sought the rule for interpreting an act of Congress in a state statute, unless such act of Congress plainly so directed, as in the practice act and some others.

If the construction contended for by plaintiff in error is sound, the Supreme Court of the U. S. can never make an interpretation of this act of Congress without first knowing whom the Legislature of the particular state may have designated as heirs; and if all statues defining heirs should be repealed, could this act have any meaning? Can a construction which leads to such absurdities be sound?

Each state has power to pass statutes of descent. It may provide by law that a man's property at his decease shall pass to whomsoever it may designate. It may enact that his property shall pass to his widow, a stranger, or the state itself. But such persons are in no legal or common law sense heirs and are not heirs in the sense of this act of Congress. Heirs are created by act of God and not by act of a legislature.

The legislature of Kansas has passed special acts making one person to inherit property of another at various times without regard to blood or lineage. See the following, viz: Chapters 89 and 91 laws 1867; Chapter 132, laws 1872; Chapter 100, laws 1873; Chapter 133, laws 1877, and perhaps others; but such inheritors are not heirs of these parties. If the legislature can make these persons heirs with the consent of these parties, they can do so without such consent. But they can't do it. They cannot inject the blood of the deceased into a would-be heir by a legislative enactment. It takes heritable blood to make an heir.

The existence of these legislative freaks makes very strong argument to support our view.

An heir can only be begotten in lawful nuptial. There is no such thing as an *illegitimate heir* because the term heir implies that he is legitimate. So from all this the conclusion is that the term heir at common law meant legitimate children or their legitimate descendants to the exclusion of illegitimates.

Has Congress intended to use the term in any other than its common law signification? We say not. The rule of construction is clear and well settled.

The act of Congress wherein this Section 2269 was passed is Sec. 2, Chapter 86, page 20, 5 Statutes at large U. S. Act March 3, 1843, entitled "An act to authorize the investigation of alleged frauds under the pre-emption laws and for other purposes."

There is nothing in this act that either in express terms or by necessary implication, or any implication whatever, indicates that Congress intended the term heir to be construed according to the state law. In other acts where such was the intention, Congress has so expressly stated in the act itself. The laws have not been uniform in the matter of the disposition of the public domain. *Under Rev. Stat. 2291, the widow or in case of her death her heirs or devisees take under Sec. 2292. In case of death of both father and mother leaving an infant child or children* (*under 21 years of age*) *the right and fee shall inure to the benefit of such infant child or children* (*not heirs.*) Heirs are not mentioned.

And the guardian etc., may have it sold in accordance with the *laws of the state*, etc., for the benefit of such infant child.

By Section 3307, upon a soldier's or sailor's death etc., his widow if *unmarried*, or in case of her death or marriage, his minor children take. In regard to mineral lands etc., Section 2338 provides, "As a condition of sale, *in the absence of necessary legislation by Congress* the *local legislature of any state or territory* may provide rules for working mines involving easements, drainage and other means to their complete development and those conditions shall be fully expressed in the patent—"

By act of Congress April 26, 1822, 3 U. S. Stat. at Large, p. 667, certain lands &c., were to go according to *the laws of Alabama.*

In matter of Bounty lands, see Sections 2418 and 2424. When patent issues to widow, see also Section 2428. Section 2443 provides modes of issuing patents to the heirs of persons entitled to bounty lands. The following is the material portion of said Section:

"The Secretary of the Interior, etc., to issue the patent in the name of the heirs of such deceased officer or soldier without specifying each, and the patent so issued in the name of the heirs generally shall inure to the benefit of the whole in such portions as they are severally entitled to by the *laws of descent in the state or territory* where the officer or soldier belonged at the time of his death."

Here the descent *according to the laws of the state or territory* is EXPRESSLY PROVIDED in the act itself. It is not the statute of descent of the state or territory where the land was located, but of state or territory where the officer or soldier belonged at the time of his death; also

note in regard to this section that it provides for all cases where an officer or soldier etc. *was entitled* to Bounty lands etc. Here the deceased officer or soldier had stronger rights to this Bounty land than the deceased pre-emptor. He is, in the language of this act, ENTITLED *to the Bounty land.* The government owed it to him; he had earned it. The deceased pre-emptor had not in his life-time acquired the right to the land.

In this case the defendant, Miller, paid with his own money which has never been repaid to him, the purchase price, to the government, and these persons who never reimbursed him nor offered to, are seeking to divest him of his title.

Cutting v. Cutting and Lamb v. Starr are cited by Kas. Sup. Ct. as supporting their view.

The Donation act of Oregon, to which careful attention is called, 9th U. S. Stat. at Large, p. 497, upon which Judge Deady decided the Cutting case, as well as Lamb vs. Starr, provides: "When the donees etc., have *complied* with the permission of this act so as to *entitle them* to the grant as there provided, and either shall have died before patent issued, the survivor and children or heirs of the deceased shall be entitled to the share or interest of the deceased in equal proportions, except when the deceased shall otherwise dispose of it by testament duly and properly executed according to the *laws of Oregon.*"

Here it is safe to say the deceased died seized of the equitable title to the land lacking only the formality of a patent to transfer a naked legal title held by the government to the donee to thereby invest him with the full legal and equitable title. The real title was in the deceased at the time of his death. He might dispose of it by testament duly and properly executed according to laws of Oregon, and what he might dispose of by last will and testament under the laws of Oregon would pass under the laws of descent of Oregon, in the absence of a will. He was *entitled to the grant* at the time of his decease. Here is something in the statute itself, showing a different intent in the use of the word heirs, as Congress has never attempted to regulate in any state or territory, the descent of property either real or personal of which a person died seized, where the substantial equity had passed to him in his life-time. Of course this property passed by the laws of Oregon, for by the act, the law of wills was expressly recognized and the law of descent by necessary inference, as any property which a person may will, will pass by the statute of descent where there is no will. So the decisions by Judge Deady fail to help the Kansas decision.

In the Cutting case he on May 3, 1864, duly proved that he made his settlement on April 11, 1849, and his continuous residence for over the four years required by the donation act and died intestate on the land in 1868.

The agreed statement of facts in that case is somewhat misleading in that it says that he (Cutting) did not then or thereafter pay the fee required by law for the patent certificate. We have not been able to find any law requiring the payment of any fee in such a case.

There is no fee provided for in the donation act, and the parties' rights are fixed by that act. The donation act Section 4, provides as follows in addition to what was quoted in the brief of counsel for deft in error: Section 4, "that there *shall be* and hereby *is granted to* etc., who shall be a resident etc., and shall have resided and cultivated the same for four consecutive years etc." It is a grant in *presenti* to the person who performs this service, not hampered or restricted by the payment of any fees. Whoever had complied with the terms, by the continued residence, acquired his perfect equitable title to the land, and I may say, that his exposing his life, and that of his family, to the perils of that savage country at that time, to assist in reclaiming it for the government against the hostile and bloody aborigines and grizzlies of that region, to redeem its civilization, was more than a high price to pay for the land. Instead of being a mild and suave donation by the abounding grace of the government, it was purchased by risking the lives of himself and family. When his four years residence had been completed he had earned the land. All that was left to be done to his complete investiture of title, was to make his proofs which was done in this case May 3, 1864.

The complete equity passed then as perfectly as though he had paid hard cash for it and it was the duty of the government to issue him his patent. The case therefore was not one in which the U. S. had any interest left, and the law of descents of Oregon, the domicil of Cutting at his death, would govern the descent of this property of which he died seized, and the full equitable owner. This was a case of descent. Oregon was erected into a territory with a provisional government by act of Aug. 14, 1848. 9 U. S. Statute at Large ch. 177, sec. 6, provides that "all laws passed by the legislative assembly of the territory shall be submitted to Congress and if disapproved shall be null and void." The statute of descents of the territory of Oregon was doubtless submitted to Congress as required by the organic act, and not being disapproved became the recognized will of Congress in that regard. As to the case of Lamb vs. Starr referred to by counsel, the question discussed at length by Judge Deady did not arise, and the whole discussion was obiter.

The facts stated are that Nancy Lownsdale died on April 15, 1854, SEIZED IN FEE OF THE LAND IN CONTROVERSY. It will be noticed that she DIED SEIZED IN FEE (and that precludes the idea of the U. S. having any interest) and of course on that state of facts, the case must of course descend according to the law of Oregon. The further facts are that she eft two children by a former husband Gilliham and two by her Lowns-

dale husband. Her surviving husband, Lownsdale, purchased the interest of her daughter Ellen Gilliham, and in a suit seeks to have that interest allowed to him. The plea was interposed that Ellen Gilliham was not, so to speak, *a child of her mother* and the court after a lengthy and learned dissertation on heirships *finally decided* that she was.

The question of heirship was not in the case as far as the act of Congress was concerned, so that the Oregon cases are not in point and do not lend any strength to the claim of defendent in error.

The case of Brown vs. Belmarde, 3 Kas., is relied on by plaintiffs. We think the holding in that case sustains the plaintiff in the case at bar, but we think it is wrong. The opinion was by Crozier, C. J., and the case was tried by able counsel, but it does not seem from a careful examination, that either counsel, or court, had their attention called to the question we raise in this case.

While we do not deny that the Legislature have power to enact a law giving the property of which a person dies seized to his bastard children, even to the exclusion of the legitimate, yet the public policy which leads to the enactment of such a law, could hardly have much moral support, as it places practically a premium on illegitimacy. And the requirement of recognition by the father is only a safe guard against a man being overloaded with his bastard offspring. We think his duty to his legitimate offspring which the laws are supposed to favor, should be held of a higher character than that to bastards begotten in crime. They may be unfortunate and it is right for the law to require the father to provide for their support as under the Bastardy act, but we fail to see the goodness, or morality, of taking the estate, in most cases acquired by the aid of the lawful wife, and morally the due of legitimate children, and giving it to bastards and placing them on an equality with legitimates.

The lawful wife marries; the marriage contract gives her the moral right to have her legitimate children of this marriage entitled to first recognition. Sound public policy, a just moral sense, and common decency require this, and a state law that puts bastards upon a parity with legitimate children is contrary to the Christian religion, tends to break down the ordinance of marriage, and is a certain retrograde toward the realms of barbarism.

The accumulations of wealth during marriage, are the result of the joint efforts of husband and wife. The title to all rests in the husband. If, as in Kansas, the wife takes the half under the laws of descent, (in case she outlives her husband,) she only gets her own earnings out of the common fund, and the implied contract of her marriage, that the children lawfully begotten therein, shall be first, is shamefully violated by a law predicated on such loose moral perceptions as to permit the father of a brood of bastards to foist them, by a recognition, by an ac-

knowledgment of his crime, into an equal inheritance with his, and his lawful wife's legitimate children, begotten in the holy bonds of wedlock. While we do not deny the power of the legislature, (which power has been recognized by the Supreme Court of Kansas,) to permit this, yet what we say is intended as a criticism upon such laws, and we think they are of such doubtful morality that we ask this court not to extend their scope in any case, nor to give effect to them unless the court finds itself bound to do so by the clearest and most inexorable rules.

In other states less liberal to married women in their statutes of distribution than Kansas, the savings and accumulations of the lawful wife are vested in the husband and she must see them taken from her own children, and devolved upon another woman's bastards. Can such results and such laws be other than revolting to right thinking people? And do we ask too much of this court, when we ask it not to apply such a law unless they find themselves required to do so by an inexorable rule? If our theory finds favor with this court, and we hope it will, we ask that the judgment of the Supreme Court of Kansas be reversed and that of the trial court affirmed.

ALMERIN GILLETT,
Attorney and Counsellor for Pl'ffs in Error.

In the Supreme Court of the United States.

D. B. MILLER AND L. B. MILLER,
Plaintiffs in Error,
vs.
JOHN CALDWELL, *Defendant in Error.*

STATEMENT OF THE CASE, ARGUMENT AND BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

On the 30th day of June, 1885, John Caldwell brought his action to have his title established to and recover possession of the northeast quarter of section 12, township 23 south, range 6 west, in Reno county, Kansas.

On April 6th, 1887, the judge of the district court in and for Reno county, Kansas, rendered his opinion and gave judgment to the defendants in that case, the plaintiffs in error here. A motion for a new trial was duly filed and entered and afterwards overruled.

John Caldwell, as plaintiff in error, duly prosecuted his appeal from the opinion of the district judge to the Supreme Court of the State of Kansas; and that afterwards the Supreme Court of the State of Kansas ren-

dered its opinion reversing the district court and rendering judgment for the plaintiff in error in that case, defendant in error here, for 13-28 of the land in controversy. From which said opinion of the Supreme Court of the State of Kansas the plaintiffs in error, D. B. and L. B. Miller, appealed to this court.

That the points of difference between the plaintiffs in error and defendant may more clearly appear, we here copy in full the findings of fact by the judge of the district court of Reno county, Kansas.

"1. On January 1, 1809, one Robert Titus, mentioned in plaintiff's petition, was lawfully married, at Sudbury, in Rutland county, Vermont, to one Phœbe Thomas; and that in October, 1810, there was born as the issue of that marriage, a son, Alden Wheeler Titus, who was the only issue of that marriage.

"2. After the birth of said son, Alden Wheeler Titus, the said Robert Titus abandoned his said wife and son and went into the war of 1812, and never lived with them any more.

"3. Said Robert Titus went from said war to East Bloomfield, in Ontario county, in the state of New York, and on July 14, 1818, without having been divorced from said Phœbe, married Miriam Lee, by whom he had five children thereafter born, viz.: Benjamin, a son, Betsey a daughter, Rachel, a daughter, Delight, a daughter, Lois, a daughter.

"4. Said Robert Titus thereafter, about the year 1832, removed from Ontario county, New York, to Lenox, Macomb county, Michigan.

"5. Defendant Lois Miller is the wife of the defendant D. B. Miller, and is the youngest daughter of said Robert Titus and Miriam Lee.

"6. Robert Titus, in the year 1850, came to live with said D. B. Miller and Lois Miller, his wife, and continued to live with them from that date until his death, in 1871.

"7. D. B. Miller and his wife Lois and said Robert Titus came to Reno county, Kansas, from Will county, in the state of Illinois, and settled there in the year 1871.

"8. Robert Titus on July 10, 1871, made a pre-emption settlement upon the land in controversy in this suit, viz.: N. E. ¼ sec. 12, township 23, range 6 west, Reno county, Kansas; and thereafter, on September 8, 1871, died, not having completed his pre-emption as required by act of Congress of March 3, 1843. (Rev. Stat. U. S. of 1878, § 2269.)

"9. Robert Titus died intestate and utterly without any money or property whatever. Upon his death said D. B. Miller was by the probate court of Reno county, Kansas, appointed administrator of said Robert Titus, deceased, and with his own money caused said pre-emption to be completed, paying the double-minimum price for said land to the government, viz.: $400. This was done in the year 1871.

"10. On the completing of said pre-emption by said D. B. Miller as administrator, a patent for said land was issued by the United States under and in accordance with the section 2269, Revised Statutes U. S., a copy of which is hereunto annexed, marked "Exhibit A," and made a part of these findings.

"11. Robert Titus died in Reno county, Kansas, intestate, on September 8, 1871.

"12. Miriam Lee died intestate, in the year 1853.

"13. His said wife, Phœbe Thomas Titus, died in Rutland county, Vermont, in the year 1860.

"14. Alden W. Titus, son of Robert and Phœbe Titus, died in Charlestown, Mass., in the year 1876, intestate, leaving heirs."

"16. Defendant D. B. Miller has purchased from said heirs of Alden W. Titus, and under proper conveyances from them is the owner of all the rights, title and interest in said land which inured to the said Alden W. Titus' benefit as the heir of said Robert Titus under said patent.

"17. Plaintiff has conveyances from the following aforesaid named children of said Robert Titus and Miriam Lee, viz.; Delight, intermarried with one Caldwell, the father of plaintiff, and Rachel, intermarried with Crandall, conveying to him whatever title they had in said land in controversy.

"18. Said Betsey, intermarried with Nathan Hicks, died, to-wit, on the — day of ——, and left surviving her, and who are still living, Nathan Hicks her husband, her son Volney Hicks, her daughter Melissa West, her daughter Ada Wade, and her daughter Arabel Snyder.

"19. Said plaintiff has procured and has from said Volney, Melissa, Ada, Arabel, deeds of conveyance, conveying to him all their several interests in the land in controversy, and from James and Joseph Miller.

"20. D. B. Miller has procured from said Nathan Hicks and has a deed of conveyance conveying to him all the right, title and interest which said Nathan Hicks had in said premises, as the surviving husband of said daughter Betsey.

"21. Benjamin Titus died in the year 1852, and left his widow, who is still living, and three daughters, two of whom are still living. The other daughter, Elmira, mar-

ried Amos Miller, and had seven children; said Elmira died in the year 1885, leaving surviving her, her said husband and the said seven children, all of whom are still living."

"23. Defendant D. B. Miller has proper conveyance of the land in controversy from said Amos Miller, and from three of the said sons of Elmira, viz.: William, conveying to him all the right, title and interest in said land of which they were respectively entitled to as heirs of said Benjamin Titus, deceased.

"24. Said children of Robert Titus and Miriam Lee were notoriously recognized by Robert Titus as his own, and no question was ever raised as to their legitimacy, until in this suit.

"25. Plaintiff demanded to be let into possession March 4, 1885.

"26. If the Miriam Lee children of Robert Titus are heirs within the meaning of the act of Congress, § 2269, U. S. Revised Statutes 1878, then the plaintiff is entitled to receive an undivided 13-28 of the said land, and damages for its detention since that time at the rate of $41.67 per year.

"The said D. B. Miller claims all of the land under the said act of Congress and under the conveyances of the legitimate heirs of Robert Titus to him; and if legitimate children only are heirs under said act of Congress, then the defendants are entitled to recover."

EXHIBIT A.

"*The United States of America, to all to whom these presents shall come—Greeting*" (Certificate No. 593.) Whereas, D. B. Miller, administrator for the heirs of Robert Titus, deceased, of Reno county, Kansas, has deposited in the general land office of the United States a certificate of the register of the land office at Wichita, Kansas, whereby it appears that full payment has been made by the said D. B. Miller, administrator, according to the provisions of the act of Congress of the 24th day of April, 1820, entitled 'An act making further provisions for the sale of the public land,' for the northeast quarter of section 12, township 23, range 6 west, in the district of lands subject to sale at Wichita, Kansas, containing one hundred and sixty acres according to the official plat of the survey of the said lands returned to the general land office by the surveyor general, which said tract has been purchased by the said D. B. Miller, administrator:

"Now know ye, that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such cases made and provided, have given and granted, and by these presents do give and grant unto the said heirs of Robert Titus, deceased,

and to their heirs, the above tract above described, to have and to hold the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature belonging, unto the said heirs of Robert Titus, deceased, and to their heirs and assigns forever.

"In testimony whereof, I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent, and the seal of the general land office to be hereunto affixed.

"Given under my hand, at the city of Washington, the 20th day of April, in the year of our Lord one thousand eight hundred and seventy-four, and of the independence of the United States the ninety-eighth.

"By the President: U. S. GRANT.

By A. WILLIAMSON, *Secretary*.

"L. K. LIPPENCOTT, *Recorder of the General Land Office*.

Recorded in volume 1, page 386.

(Seal.) General Land Office U. S."

And thereon the court made the following conclusions of law:

"From the foregoing findings of fact the court finds for the defendants; to all of which plaintiff excepts."

To the conclusion of law and judgment of the trial court this defendant in error duly excepted and prosecuted to the Supreme Court of the State of Kansas his appeal, where the trial court was reversed, and the defendant awarded thirteen-twenty-eighth (13-28) of the land in controversy. The plaintiffs in error bring their appeal here, complaining of and seeking to reverse the judgment of the Kansas Supreme Court.

ARGUMENT.

As is said by Chief Justice Horton, in the opinion of the Kansas Supreme Court, the pivotal question in this case is the interpretation of Sec. 2269, Revised Statutes of 1878, which reads as follows:

"When a party entitled to claim the benefits of the preemption laws dies before consummating his claim, by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party, or one of the

heirs, to file the necessary papers to complete the same; but the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs as if their names had been specially mentioned."

Counsel for plaintiffs in error contend that the word "heirs," as used in this section of the statute, being a congressional enactment, should be interpreted by the common law.

On behalf of the defendant we contend that the word "heirs" should be interpreted by the law of place.

So far as we know congress has never enacted a statute of descents and distribution, or adopted the common law rule.

The fact that the grant is direct to the heirs as grantees makes no difference since none but the "heirs" can take the land. The question of heirship becomes important.

We contend the statutes of Kansas should govern, and the rule there established and affirmed be a long line of decisions of the highest court in the state ought to be followed, and is the law of the land.

As to who is the wife or who is the heirs of a decendent is a question to be determined by the laws of the state.

The Kansas statutes abound with well defined rules for determining who are the heirs of deceased persons, and the highest court in the state has repeatedly construed and given force and effect to these rules.

The following sections of the act concerning descent and distribution were in force at the time of the decease of Robert Titus, and ever since that time, and are now.

"SEC. 22. Illegitimate children inherit from the mother, and the mother from the children."

SEC. 23. They shall also inherit from the father when-

ever they have been recognized by him as his children, but such recognition must have been general and notorious or else in writing."

Gen. Stat. 1868, chapter 33, page 786. Vol. 1, Gen. Stat., 1889.

Congress has not defined the term "heirs" as used in the statute herein referred to. The land is located in the State of Kansas. Robert Titus died in Kansas. We think, to determine who are the heirs of Robert Titus, we should look to the Kansas statutes and Kansas decisions. It seems to us this whole question is well settled in the opinion of the Kansas Supreme Court in this case from which the plaintiff in error appeals.

We copy the opinion in full, as follows:

JOHN CALDWELL v. D. B. MILLER *et al.*

1. PRE-EMPTION—*Heirs of Deceased Pre-emptor—Patent, Construed.* Where a party entitled to the benefits of the pre-emption laws of the United States makes a pre-emption filing in this state, but dies before consummating his claim, and his administrator files the necessary papers to complete the same, and upon payment for the land obtains from the United States a patent granting the land unto the "heirs of the deceased pre-emptor," the word "heirs" in the patent is to be construed with reference to the laws of this state; and whoever, under the laws of this state, would have inherited from the deceased pre-emptor, are the persons to whose benefit the land granted by the patent insures.
2. ILLEGITIMATE CHILDREN, *Inherit, When.* Under the statutes of Kansas, illegitimate children inherit from the father, the same as the legitimate children, when such illegitimate children have been generally and notoriously recognized by him as his own.
3. FACTS, *Stated—Word "Heirs" Includes Illegitimate Children.* On the 10th of July, 1871, T. made a pre-emption settlement upon a quarter-section of land in Reno county; he died before consummating his claim to the pre-emption; the administrator of his estate completed the pre-emption, and on the 20th of April, 1874, obtained a patent from the United States to the land; the patent granted unto the said heirs of T. deceased, (the dead pre-emptor) and to their heirs, the tract pre-empted; T., at the time of his death, had living a legitimate child, and also illegitimate children, whom he had generally and notoriously recognized as his own. *Held*, That the word "heirs" in the patent included the illegitimate children as well as the legitimate child.

Error from Reno District Court.

On the 30th day of June, 1885, John Caldwell brought his action to have his title established to and recover possession of the northeast quarter of section 12, township 23 south, range 6 west, in Reno county. On January 24, 1887, the case was submitted to the court, a jury being waived. The court was requested by both parties to find separately the facts and law. After hearing all the testimony the court took the case under advisement until the 6th of April, 1887. At that time the court made and filed the following findings of fact:

"1. On January 1, 1809, one Robert Titus, mentioned in plaintiff's petition, was lawfully married, at Sudbury, in Rutland county, Vermont, to one Phœbe Thomas; and that in October, 1810, there was born as the issue of that marriage, a son, Alden Wheeler Titus, who was the only issue of that marriage.

"2. After the birth of said son, Alden Wheeler Titus, the said Robert Titus abandoned his said wife and son and went into the war of 1812, and never lived with them any more.

"3. Said Robert Titus went from said war to East Bloomfield, in Ontario county, in the state of New York, and on July 14, 1818, without having been divorced from said Phœbe, married Miriam Lee, by whom he had five children thereafter born, viz.: Benjamin, a son, Betsey a daughter, Rachel, a daughter, Delight, a daughter, Lois, a daughter.

"4. Said Robert Titus thereafter, about the year 1832, removed from Ontario county, New York, to Lenox, Macomb county, Michigan.

"5. Defendant Lois Miller is the wife of the defendant D. B. Miller, and is the youngest daughter of said Robert Titus and Miriam Lee.

"6. Robert Titus, in the year 1850, came to live with said D. B. Miller and Lois Miller, his wife, and continued to live with them from that date until his death, in 1871.

"7. D. B. Miller and his wife Lois and said Robert Titus came to Reno county, Kansas, from Will county, in the state of Illinois, and settled there in the year 1871.

"8. Robert Titus on July 10, 1871, made a pre-emption settlement upon the land in controversy in this suit, viz.: N. E. ¼ sec. 12, township 23, range 6 west, Reno county, Kansas; and thereafter, on September 8, 1871, died, not having completed his pre-emption as required by act of Congress of March 3, 1843. (Rev. Stat. U. S. of 1878, § 2269.)

"9. Robert Titus died intestate and utterly without

any money or property whatever. Upon his death said D. B. Miller was by the probate court of Reno county, Kansas, appointed administrator of said Robert Titus, deceased, and with his own money caused said pre-emption to be completed, paying the double-minimum price for said land to the government, viz.: $400. This was done in the year 1871.

"10. On the completing of said pre-emption by said D. B. Miller as administrator, a patent for said land was issued by the United States under and in accordance with the section 2269, Revised Statutes U. S., a copy of which is hereunto annexed, marked "Exhibit A," and made a part of these findings.

"11. Robert Titus died in Reno county, Kansas, intestate, on September 8, 1871.

"12. Miriam Lee died intestate, in the year 1853.

"13. His said wife, Phœbe Thomas Titus, died in Rutland county, Vermont, in the year 1860.

"14. Alden W. Titus, son of Robert and Phœbe Titus, died in Charlestown, Mass., in the year 1876, intestate, leaving heirs."

"16. Defendant D. B. Miller has purchased from said heirs of Alden W. Titus, and under proper conveyances from them is the owner of all the rights, title and interest in said land which inured to the said Alden W. Titus' benefit as the heir of said Robert Titus under said patent.

"17. Plaintiff has conveyances from the following aforesaid named children of said Robert Titus and Miriam Lee, viz.; Delight, intermarried with one Caldwell, the father of plaintiff, and Rachel, intermarried with Crandall, conveying to him whatever title they had in said land in controversy.

"18. Said Betsey, intermarried with Nathan Hicks, died, to-wit, on the — day of ——, and left surviving her, and who are still living, Nathan Hicks her husband, her son Volney Hicks, her daughter Melissa West, her daughter Ada Wade, and her daughter Arabel Snyder.

"19. Said plaintiff has procured and has from said Volney, Melissa, Ada, Arabel, deeds of conveyance, conveying to him all their several interests in the land in controversy, and from James and Joseph Miller.

"20. D. B. Miller has procured from said Nathan Hicks and has a deed of conveyance conveying to him all the right, title and interest which said Nathan Hicks had in said premises, as the surviving husband of said daughter Betsey.

"21. Benjamin Titus died in the year 1852, and left his widow, who is still living, and three daughters, two of whom are still living. The other daughter, Elmira, married Amos Miller, and had seven children; said Elmira

died in the year 1885, leaving surviving her, her said husband and the said seven children, all of whom are still living."

"23. Defendant D. B. Miller has proper conveyance of the land in controversy from said Amos Miller, and from three of the said sons of Elmira, viz.: William, conveying to him all the right, title and interest in said land of which they were respectively entitled to as heirs of said Benjamin Titus, deceased.

"24. Said children of Robert Titus and Miriam Lee were notoriously recognized by Robert Titus as his own, and no question was ever raised as to their legitimacy, until in this suit.

"25. Plaintiff demanded to be let into possession March 4, 1885.

"26. If the Miriam Lee children of Robert Titus are heirs within the meaning of the act of Congress, § 2269, U. S. Revised Statutes 1878, then the plaintiff is entitled to receive an undivided 13-28 of the said land, and damages for its detention since that time at the rate of $41.67 per year.

"The said D. B. Miller claims all of the land under the said act of Congress and under the conveyances of the legitimate heirs of Robert Titus to him; and if legitimate children only are heirs under said act of Congress, then the defendants are entitled to recover."

EXHIBIT A.

"*The United States of America, to all to whom these presents shall come—Greeting:* (Certificate No. 593.) Whereas, D. B. Miller, administrator for the heirs of Robert Titus, deceased, of Reno county, Kansas, has deposited in the general land office of the United States a certificate of the register of the land office at Wichita, Kansas, whereby it appears that full payment has been made by the said D. B. Miller, administrator, according to the provisions of the act of Congress of the 24th day of April, 1820, entitled 'An act making further provisions for the sale of the public land,' for the northeast quarter of section 12, township 23, range 6 west, in the district of lands subject to sale at Wichita, Kansas, containing one hundred and sixty acres according to the official plat of the survey of the said lands returned to the general land office by the surveyor general, which said tract has been purchased by the said D. B. Miller, administrator:

"Now know ye, that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such cases made and provided, have given and granted, and by these presents do give and grant unto the said heirs of Robert Titus, deceased, and to their heirs, the above tract above described, to

have and to hold the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature belonging, unto the said heirs of Robert Titus, deceased, and to their heirs and assigns forever.

"In testimony whereof, I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent, and the seal of the general land office to be hereunto affixed.

"Given under my hand, at the city of Washington, the 20th day of April, in the year of our Lord one thousand eight hundred and seventy-four, and of the independence of the United States the ninety-eighth.

"By the President: U. S. GRANT.

By A. WILLIAMSON, *Secretary*.

"L. K. LIPPENCOTT, *Recorder of the General Land Office*.

Recorded in volume 1, page 386.

(Seal.) General Land Office U. S."

And thereon the court made the following conclusions of law:

"From the foregoing findings of fact the court finds for the defendants; to all of which plaintiff excepts."

The court then rendered judgment for D. B. Miller; adjudging him the owner in fee simple of the northeast quarter of section 12, township 23 south, range 6, in Reno county, and entitled to the lawful possession of the same; and further rendered judgment that he and D. B. Miller were in the lawful possession of the property at the commencement of the action. The plaintiff filed a motion for a new trial, which was overruled. He excepted, and brings the case to this court.

Brown & Kline, for plaintiff in error.

Vandeveer & Martin, and *Almerin Gillett*, for defendants in error.

The opinion of the court was delivered by

HORTON, C. J.: On the 10th day of July 1871, Robert Titus made a pre-emption settlement upon the land in controversy, being a quarter-section of land in Reno county, in this state. He died before consumating his claim of pre-emption. After his death, D. B. Miller, administrator of his estate, filed the necessary papers to complete the pre-emption, paying the price thereof, $400, from his own money to the United States. On the 20th day of April, 1874, a patent to the land was issued by the

United States. The patent, among other things, recited that—

"The United States of America, in consideration of the premises and in conformity with the several acts of Congress in such cases made and provided, have given and granted, and by these presents do give and grant unto the said heirs of Robert Titus, deceased, and to their heirs, the above tract described, to have and to hold the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the said heirs of Robert Titus, deceased, and to their heirs and assigns forever."

Robert Titus, who made the pre-emption settlement, was married to Phœbe Thomas in Vermont, in 1809. The only issue of this marriage was Alden W. Titus, born in October, 1810. After the birth of his son, Robert Titus abandoned both his wife and child. Without having a divorce, he had a marriage ceremony performed between him and Miriam Lee, in the state of New York, on July 14, 1818. By Miriam Lee he had five children. The youngest was the daughter Lois. Lois married D. B. Miller, one of the defendants. In 1871 D. B. Miller, his his wife and Robert Titus came to this state from Illinois, and settled in Reno county. Soon after, Titus pre-empted the land now claimed by Miller. Miriam Lee died in 1853. Mrs. Phœbe T. Titus died in Vermont, in 1860. Alden W. Titus, the son by Mrs. Phœbe T. Titus, died in 1876, intestate, leaving heirs. D. B. Miller purchased from the heirs of Alden W. Titus, deceased, all their right and title to the land in dispute, and claims the fee-simple title thereof by conveyances from them as the only heirs of Robert Titus, diceased. John Caldwell, the plaintiff, is a son of Delight, a daughter of Robert Titus by Miriam Lee, and claims a portion of the land from her and through conveyances from several of the children and heirs of the children of Miriam Lee.

The pivotal question is the interpretation of § 2269, Revised Statutes of the United States, 1878. This question is one which may ultimately be decided by the Supreme Court of the United States; therefore the final decision does not rest with us. The section reads:

"When a party entitled to claim the benefits of the pre-emption laws dies before consummating his claim, by filing in due time all the papers essential to the establish-

ment of the same, it shall be competent for the executor or administrator of the estate of such party, or one of the heirs, to file the necessary papers to complete the same; but the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs as if their names had been specially mentioned."

The plaintiff contends that the words "the heirs of the deceased pre-emptor" include legitimate and illegitimate children, if the illegitimate children were generally and notoriously recognized by Robert Titus in his lifetime as his own. Under this rule, the heirs of Alden W. Titus, deceased, and the children of Miriam Lee, or their heirs, are all heirs of Robert Titus, deceased. This would give John Caldwell an undivided thirteen-twenty-eighth of the land, and damages for its detention.

On the other hand, the defendants claim that the word "heirs" must be determined by the common law of England. Therefore it is contended by them that the heirs of Alden W. Titus, deceased, has the sole right to the land prior to their conveyances to D. B. Miller. This would give all the land to Miller.

In interpreting the United States statutes, the question is not what Congress has the power to do, but what Congress has already done. Congress has not defined the term "heirs." The land is situate in this state. Robert Titus died in this state. Therefore, to determine who are meant by the words in the patent, "heirs of Robert Titus, deceased," we think we must look to the statutes of this state. "It seems to us scarcely necessary to say that this is purely a question of statutory law." (*McKinney v. Stewart*, 5 Kas. 391.) "An heir is one who by statute is capable of inheriting from another, or one who succeeds to the estate of deceased." (*McKinney v. Stewart*, supra; *Delashmutt v. Parrent*, 40 Kas. 641.)

In the act concerning descents and distribution are the following provisions, which are now in force, and were also in force at and before the death of Robert Titus:

SEC. 22. Illegitimate children inherit from the mother, and the mother from the children.

2. Illegitimate children inherit, when.

"SEC. 23. They shall also inherit from the father, when they have been recognized by him as his children; but such recognition must have been general and notorious, or else in writing." (Gen. Stat. of 1889, ch. 33, pp. 780-787.)

3. Illegitimate children included among heirs.

Under this statute, as the children of Miriam Lee were generally and notoriously recognized by Robert Titus as his own, they inherited from their father with Alden W. Titus, the legitimate child. The conclusion of law of the district court in favor of the defendants is therefore erroneous.

That the statute of this state must determine who are "heirs," is in accord with the prior decisions of this court. In *Brown v. Belmarde*, 3 Kas. 41, the syllabus reads:

"Prior to the treaty of June 3, 1825, with the Kansas Indians, they had the 'Indian title,' *i. e.*, a life interest in the usufruct, of a body of land in eastern Kansas, including that in controversy, the United States holding the ultimate title, charged with interest of the Indian Nation, so long as they should remain a nation. This 'Indian title' was by the sixth article of that treaty vested in certain individuals—that to the land in question in Lavonture.

"From the death of Lavonture, in 1847 or 1848, to the passage of the act of Congress, May 26, 1860, the whole title to the land in question was in the government, and that act operated as an original grant to certain reservees and the 'heirs of deceased reservees' mentioned therein.

1. The word "heirs" in patent, how construed.

'Heirs of deceased reservees' used therein is *descriptio personæ*, and is to be construed with reference to, and determined by the law at the time the estate passed, and whoever under the laws of this state would have inherited, had Lavonture died May 26, 1860, (the date of the approval of the act of congress,) are the persons to whose benefit the grant inured."

In *Clark v. Lord*, 20 Kas. 390, it is said:

"The patent was not issued to Eleanor Richardson, but to 'the heirs of Eliza Richardson,' and said Eleanor Richardson obtained her interest, not as an allottee, not as the patentee, but by virtue of the laws of the state of Kansas, which authorized her, as an heir of Eliza Richardson, to inherit the estate of her sister. If Eliza had lived, the lands would have been alloted and patented to her. After her death they were patented to her heirs, without naming them; and the law of the state determined who these were. Eleanor simply inherited the lands granted to Eliza during her life; and the patent is evidence of the partition of the lands, and the division made in pursuance of the treaty. The death of Eliza Richardson did not change the terms and conditions of the treaty, nor annul the grant to her; but as the patent could not issue to a dead person, it was necessarily issued to the heirs of Eliza; but such heirs were not controlled by the restric-

tions applicable to the allottees and patentees. If the patent had issued to Eliza in her lifetime her death would have abrogated the restrictions on the alienation of the land, and having issued after her decease, it placed the heirs in the same condition, as to their rights in the property, as if issued before."

See also *Cutting v. Cutting* 6 Sawyer, 396-406; 21 Myer's Federal Decisions, 370, 371-399; *Lamb v. Starr*, 1 Deady, 358.

Defendants cite *McCool v. Smith*, 1 Black 459, but we do not think the decision is authority for them. "Next of kin" is construed in that case by the common law definition for the reason that the common law of England was in force by express statute in the state of Illinois at the death of the party referred to in the opinion. If we were required to go outside of the statutes of this state and to the common law of England to determine what is meant by the term "heirs," we should have insuperable difficulties to encounter. If we are not to construe "heirs" in this case by the statute of this state, it is impossible to determine, as congress has not adopted the common law of England, what part or portion of the common law of that country is applicable.

Among the canons of descent, as enumerated by Blackstone, are two which are wholly inapplicable to this country, and which could never have been within the intention of congress to apply in this state, or any other state of the Union. One of these common law canons is, "that where there are two or more males, in equal degree, the eldest only shall inherit; but the females all together. As, if a man had two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies, Matthew, his eldest son, shall alone succeed to his estate, in exclusion of Gilbert, the second son, and both the daughters; but if both the sons die without issue before the father, the daughters, Margaret and Charlotte, shall both inherit the estate as co-parceners." The other canon is, "that the male issue shall be admitted before the female. Thus, sons shall be admitted before daughters; or, as our male law-givers have somewhat uncomplaisantly expressed it, the worthiest of blood shall be preferred. As, if John Stiles hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; first Mat-

thew and (in case of his death without issue) then Gilbert, shall be admitted to the succession, in preference to both the daughter." (2 Bl. Com. [Wendell,] pp. 212, 213.)

We do not think it necessary to comment upon the attempted removal of this case to the United States circuit court. After the application for removal was denied by the district court, the parties filed new pleadings and entered into various stipulation and wholly disregarded any attempted removal.

The judgment of the district court must be reversed, and the cause remanded, with direction to the court below to enter judgment upon the findings of fact in favor of John Caldwell and against the defendants for the undivided 13-28 of the land and damages for its detention from March 4, 1885, at the rate of $41.67 per year.

All the Justices concurring.

In our opinion, the case of *Cutting v. Cutting, et al*, 6 Sawyer 396, is directly in point. We quote from the opinion, on page 405:

"Who are the heirs of Charles Cutting is a matter to be determined solely by the local law—the law of Oregon."

As was said by this Court in *Lamb v. Starr, supra*: "*The donation act does* not prescribe who shall be considered the heirs of a deceased settler, any more than it prescribes who shall be considered the wife of a settler. Both these are left to the local law—the law of Oregon. Who would be entitled to claim as heir of the deceased would in all cases depend upon the law of Oregon at the time of the death; but persons claiming as children are, by the donation act, preferred to those claiming simply as heirs by the local law."

Returning now to the case at bar, and we see that by the local law in force at the time of the death of Robert Titus, illegitimate as well as legitimate children were "heirs."

In the case of John R. Lamb vs. Lewis M. Starr, 1st Deady, on page 358, the court uses the following language respecting the *Donation Act:* An act, so far as defining and interpreting the words "*children or heirs*," as in every respect like Sec. 2269, under consideration here.

"The donation act does not prescribe who shall be considered the heirs of a deceased settler any more than it does not prescribe who shall be the wife of a settler; both of these allude to the local law—the law of Oregon." The law of Oregon at the time of Nancy's death had prescribed that brothers and sisters should be heirs to the intestate, either exclusive or inclusive of the children. It appears to me that under the donation act then the children would take to the exclusion of the brothers and sisters. Congress seems to have intended to secure to the wife of the deceased and to her children whether the law of Oregon made them heirs or not. Beyond this it left the matter to the local law by providing the alternative that in default of children, said share should go to her heirs whoever they might be. Who would be entitled to claim as heir of the deceased would in all cases depend upon the law of Oregon at the time of the death; but persons claiming as children, are, by the donation act referred to, that are simply heirs by the local law.

The act providing for the issuing of a patent to the heirs of the deceased Robert Titus differs from the donation act under which the parties were claiming in the case of *Lamb v. Starr*, in this, the donation act provides that a patent shall issue to the *wife and children or heirs* of the deceased claimant. There is no provision in the act under consideration that the title should inure to the *wife* or *children* of Robert Titus, but that it should *inure* to the *heirs*; then it seems to us that the question as to who are the *heirs* of Robert Titus is a question to be determined alone by the Kansas law inforce at the time of the death of Robert Titus.

As opposed to the theory advanced by counsel for the

plaintiffs in error that the statute under which we claim should be interpreted by the common law of England, we desire to call the attention of the court to the interpretation given to similar laws in connection with the local law, and the force and effect of such interpretations.

In the case of *Burgess v. Seligman*, commencing on page 20, Vol. 107, U. S. Court Reports, we desire to call the attention of the court to the language of Justice Bradley, found on page 33. "The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with and not subordinate to that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomolous and inconvenient, but for the exercise of a mutual respect and deference; since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions, certain rules are established which become rules of property and action in the state and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate; and in the construction of said constructions and statutes, such established rules are always regarded by the federal courts no less than by the state courts themselves as authoritive declarations of what the law is. But where the law has not been thus settled, it is the right and the duty of the federal courts to exercise their own judgment, as they always do, in reference to the doctrines of common law and general jurisprudence."

In the case of *Bucher v. Cheshire Railroad Co.*, commencing on page 555, Vol. 125, U. S. Reports, on page 584, Justice Miller makes use of the following language, with reference to the common law: "When in an ordinary trial in an action of law, we speak of the common law, we refer to the law of the state as it has been adopted by statute or recognized by the courts as the foundation of legal rights. It is in regard to decisions made by the said courts in reference to this law, and defining what is the law of the state as modified by the opinions of its own court, by the statutes of the state and the customs and habits of the people that the trouble arises. It may be said generally that referring to the deci-

sions of the state courts relating to some law of a local character which may have become established by those courts or has always been a part of the law of the state, though the decisions upon the subject are usually conclusive and always entitled to the highest respect of the federal courts. The whole of this subject has recently been very ably reviewed in the case of *Burgess v. Seligman*, 107 U. S. 20, where such local law or custom has been established by repeated decisions of the highest courts of the state, and it becomes also the law governing the courts of the United States sitting in that state."

Recurring again to the law of descent and distribution as found in the Kansas statutes, we say that that law not only furnishes within itself a clear and precise rule of construction, but that the same has been repeatedly construed by the Supreme Court of the State of Kansas, the court of last resort, and it is needless to say that the opinions of the Supreme Court have been uniform and well considered, and that federal statutes relating to the subject matter of descent and distribution have been harmonized and construed together with the Kansas law. The federal statute under which the grant was made must be construed so that the word "heirs," as used in that statute, will harmonize with the provision of the Kansas law on the same subject. There seems to be no room for discord or disagreement between the state and federal courts upon that subject, when we take into consideration the cases in first Deady, sixth Sawyer. *Bucher v. Cheshire Railroad Co.*, 125 U. S., page 584, and *Burgess v. Seligman*, 107 U. S., page 20.

In the trial of this cause in the Kansas Supreme Conrt counsel for the plaintiffs in error seemed to rely on the case of *McCool v. Smith*, 1 Black 459, as establishing the common law rule of construction.

We think as the Kansas Supreme Court in this case has said that the case of *McCool v. Smith* does not apply to

the case at bar. In that case the court held that the term 'next of kin" as used in an act of the legislature of Illinois should be construed by the common law, for the reason that the common law of England was in force in the State of Illinois at that time. We insist that the reason for that rule is in the fact that the legislature of the State of Illinois had prior to that time adopted the common law of England and the same was in full force at the time of the hearing in that case. Instead of the case sustaining the common law theory as advanced by counsel for the plaintiffs in error, we are inclined to think the reasoning in a measure sustains our theory, to wit, that the federal courts in dealing with the subject matter of descents and distributions in the several states look first to the state law force rule of interpretation.

We quote from the opinion: "When Alonzo Redmond died the common law of England was in full force in the State of Illinois. The ordinance of 1787 guaranteed that judicial proceedings in the Territory should be according to the course of the common law. In 1795, the Territorial governor and judges adopted that law for the territory.

"By act of the legislature of Illinois of the 4th of February, 1819, it was provided: That the common law of England and all the statutes or acts of the British Parliament made in aid of the common law prior to the fourth year of the reign of King James the First, excepting the second section of the sixth chapter of xiii Elizabeth, eighth chapter xiii Elizabeth and ninth chapter xxxvii Henry VIII, and which are of a general nature and not local to the kingdom shall be the rule of or decision and shall be considered in full force until repealed by legislative authority, which act has been in force ever since its date."

We have ventured the assertion that had the legislature of Illinois prior to commencement of that action provided by statute that the common law should not apply or had defined who were "next of kin," and that law had been repeatedly construed as has the law under consideration in this case been construed by our Supreme Court that

this the state law and decisions would have been adopted as the rnle of construction by the federal court.

Under the laws of Kansas we find that illegitimate as well as legitimate children are heirs. It seems to us that the laws of Kansas must be looked to in order to determine who are the heirs of the deceased pre-emptor of Kansas lands. Suppose an act of Congress should provide that upon the death of a pre-emptor the administrator should complete the entry and that the title should inure to the *wife*, what law would be looked to to determine who was the wife. There is no act of Congress by which that fact can be determined; and we are forced to the conclusion that the law of *place* must be examined and construed for that purpose. It is true that Congress has full power and authority to dispose of the lands of a deceased pre-emptor, and to grant a piece of land that has been settled upon to the wife or to the children or any other person on the death of a pre-emptor or may provide that the land revert back to the government.

We do not wish to be understood as saying that Congress has not this power. As is said by the Supreme Court of Kansas in this case in the opinion herein quoted in full. "The question is not what Congress has power to do but what Congress has done." It has provided that the land shall be granted to the heirs of a deceased pre-emptor; in this case, the heirs of Robert Titus then as we have before stated, Congress having failed to establish a rule by which the question of "heirs" or who are "heirs" can be determined, and the local law or laws of Kansas have provided a plain and well-defined rule to determine that question; that then the laws of Kansas must be looked to to determine it.

From the third Kansas case on down to and including the opinion of the Supreme Court in this case, this law has been well defined. The patent in the case at bar was dated in 1874. It conveyed land to the heirs of Robert Titus, and his "heirs" at that time, were his illegitimate as well as his legitimate children according to the Kansas laws.

In conclusion, we say that the word "heirs" as used in the section of the Congressional Enactment, conveying to the heirs of Robert Titus the land in controversy, should be construed by the laws of place, the laws of the State of Kansas. That by the laws of the State of Kansas the illegitimate, as well as the legitimate children of Robert Titus are his heirs. That the Supreme Court of the State of Kansas so found and awarded to the defendant in error 13-28 of the land in controversy, and we think that the law as determined and defined by the opinion of the Supreme Court herein, is correct and is the law of the land.

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